82-1511

Office-Supreme Court, U.S.
FILED
MAR 11 1983

No. _____

IN THE

Supreme Court of the United States

October Term, 1982

STATE OF CALIFORNIA, *et al.*,

Cross-Petitioners,

vs.

JAMES G. WATT, *et al.*,

Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

TRENT W. ORR*
NATURAL RESOURCES DEFENSE COUNCIL, INC.
25 Kearney Street
San Francisco, Calif. 94108
(415) 421-6561
Attorney for Natural Resources Defense Council, Inc.

ROGER BEERS*
KATHRYN BURKETT DICKSON
WILLIAM M. BOYD
Of Counsel
BEERS AND DICKSON
380 Hayes Street
Suite 1
San Francisco, Calif. 94102
(415) 861-1401
Attorneys for County of Humboldt, et al.

**Counsel of Record*

JOHN K. VAN DE KAMP,
Attorney General
N. GREGORY TAYLOR,
Assistant Attorney General
THEODORA BERGER*,
JOHN A. SAURENMAN,
Deputy Attorneys General
3580 Wilshire Boulevard
Los Angeles, Calif. 90010
(213) 736-2191
Attorneys for State of California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Question Presented.

Whether the meaning of the phrase "to the maximum extent practicable," as used in § 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(1), is ripe for judicial determination, and, if so, whether the discussion of that term by the Court of Appeals for the Ninth Circuit is correct.

Parties to the Proceeding.

This litigation was commenced by the filing of separate complaints by the State of California and several environmental groups. Parties plaintiff included the State of California (acting by and through the Governor, the California Coastal Commission, the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, and the California Department of Conservation), the Natural Resources Defense Council, Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale No. 53. A number of California cities and counties intervened as parties plaintiff in the litigation brought by the State: the Counties of Humboldt, Marin, Mendocino, Monterey, San Diego, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, and Sonoma, and the Cities of Brisbane, Capitola, Carmel-by-the-Sea, Los Angeles, Morro Bay, Pismo Beach, San Francisco, San Luis Obispo, Santa Barbara, Santa Cruz, Santa Monica, and Seaside, as well as the Association of the Monterey Bay Area Governments. Named as defendants, in addition to the Secretary of Interior, were the United States Department of the Interior, the United States Bureau of Land Management, Edward Hastey

(then Acting Director of the United States Bureau of Land Management) and Robert Burford (then Director Designate and now Director of the United States Bureau of Land Management). The Western Oil and Gas Association intervened as a party defendant in the litigation, as did Amoco Production Co., Atlantic Richfield Co., Champlin Refining Co., Chevron U.S.A., Inc., Cities Service Co., Conoco, Inc., Exxon Corp., Elf Aquitaine Oil & Gas, Getty Oil Co., Gulf Oil Corp., Phillips Petroleum Co., and Shell Oil Co. Amicus briefs were filed in the Ninth Circuit on behalf of the Coastal States Organization and the States of Alaska, Florida, Maine, Massachusetts, North Carolina, and Oregon.

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vs.

JAMES G. WATT, *et al.*,

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Opinions Below.

The opinion of the Court of Appeals, DOI Pet. at 1a-33a, is reported at 683 F.2d 1253 (9th Cir. 1982). The opinion of the District Court, DOI Pet. at 34a-78a, is reported at 520 F.Supp. 1359 (C.D. Cal. 1981).[1]

[1]This cross-petition filed jointly by all of the parties plaintiff below, as identified *supra* at iv, with the exception of the City and County of San Francisco and the counties of Santa Clara and San Diego. References to the petition for a writ of certiorari of the Secretary of the Interior, *et al.* are given herein as "DOI Pet. at ____." All citations to the opinions below are to the appendices to Interior's petition, *e.g.*, DOI Pet. at 43a. Cross-petitioners hereby adopt those appendices in lieu of reproduction of the opinions below in this cross-petition. References to the petition of the Western Oil and Gas Association, *et al.*, are given as "WOGA Pet. at ____."

Jurisdiction.

The judgment of the Court of Appeals was entered on August 12, 1982. DOI Pet. at 82a. A timely petition for rehearing was denied on November 10, 1982, DOI Pet. at 83a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

This cross-petition is filed pursuant to Rule 19.5 of the Rules of this Court. The petition for a writ of certiorari of the Secretary of the Interior, *et al.*, was received February 11, 1983, by cross-petitioners the Natural Resources Defense Council, Inc., *et al.*, and February 14, 1983, by the remaining cross-petitioners. The petition of the Western Oil and Gas Association, *et al.*, was received by all cross-petitioners February 9, 1983.

Statutes and Regulations Involved.

Section 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(1):

> Each federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

15 C.F.R. § 930.32 of the regulations of the National Oceanic and Atmospheric Administration implementing § 307(c)(1):

> (a) The term "consistent to the maximum extent practicable" describes the requirement for Federal activities including development projects directly affecting the coastal zone of States with approved management programs to be fully consistent with such programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations. If a Federal agency asserts that

compliance with the management program is prohibited, it must clearly describe to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency's discretion to comply with the provisions of the management program.

The duty the Act imposes upon Federal agencies is not set aside by virtue of section 307(e). The Act was intended to cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing within such agencies. Accordingly, when read together, sections 307(c)(1) and (2) and 307(e) require Federal agencies, whenever legally permissible, to consider State-management programs as supplemental requirements to be adhered to in addition to existing agency mandates.

(b) A Federal agency may deviate from full consistency with an approved management program when such deviation is justified because of some unforeseen circumstances arising after the approval of the management program which present the Federal agency with a substantial obstacle that prevents complete adherence to the approved program.

See also 44 Fed. Reg. 37142 (1979).

Statement of the Case.

Cross-petitioners hereby adopt the Statement of the Case presented in their brief in Opposition to Petitions for Writ of Certiorari in *Watt v. State of California*, No. 82-1326, and *Western Oil and Gas Association v. State of California*, No. 82-1327 (filed February 8, 1983). To that Statement, cross-petitioners add the following brief statement relevant to the question presented in their cross-petition.

Part IV.E. of the opinion of the Court of Appeals for the Ninth Circuit discussed the meaning of the phrase "to the

maximum extent practicable" as used in § 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1). DOI Pet. at 19a-23a. This phrase describes the degree to which federal activities directly affecting a state's coastal zone must be consistent with that state's coastal management program. The Ninth Circuit suggested that this phrase indicates that a state's coastal program does not take "precedence when it would preclude the federal activity" nor that the federal activity need be as consistent as possible with the terms of that program. DOI Pet. at 19a. The Court of Appeals also offered a series of factors for consideration in determining whether a given federal activity was, to the maximum extent practicable, consistent with a state program. DOI Pet. at 22a.

The meaning of the phrase "to the maximum extent practicable" had not been briefed or argued by the parties prior to the issuance of the Ninth Circuit's opinion because no consistency determination had been prepared by Interior regarding Lease Sale 53. Timely petitions for rehearing on this portion of the Court of Appeals' opinion by the State of California, *et al.*, and the Natural Resources Defense Council, Inc., *et al.*, were denied November 10, 1982.

REASONS FOR GRANTING THE WRIT.

If the Court decides to grant the petitions for writ of certiorari of the Secretary of the Interior and the Western Oil and Gas Association (WOGA) in order to review the issue of whether an oil lease sale on the Outer Continental Shelf is an activity "directly affecting" the coastal zone of an adjacent state within the meaning of § 307(c)(1) of the CZMA, 16 U.S.C. § 1456(c)(1), logically it should also review that portion of the Ninth Circuit's opinion regarding the meaning of the phrase "to the maximum extent practicable" in that provision. Part IV.E., DOI Pet. at 19a-22a. Section 307(c)(1) requires:

> Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

The two phrases are thus both important parts of the consistency scheme applied to federal agencies by this section.

However, as set forth in their brief in opposition to the Secretary's and WOGA's petitions, cross-petitioners, the State of California, Natural Resources Defense Council, Inc., *et al.*, and County of Humboldt, *et al.*, do not believe the question presented by those petitioners to be worthy of review on certiorari by the Court. Cross-petitioners have filed this cross-petition out of an abundance of caution to insure that arguments dealing with that portion of the Ninth Circuit's opinion examining the phrase "to the maximum extent practicable" can be presented in this Court *in the event* that it grants certiorari to review the question presented by the Solicitor General and WOGA. Although cross-petitioners believe that a cross-petition is not required in this case to preserve argument on this point, the law is not entirely clear in this regard. *See, e.g., Blum v. Bacon,*

.... U.S. ...., 102 S.Ct. 2355, 2359 n. 5 (1982); *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n. 11 (1976); *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480 (1976).[2]

I.

The Determination of the Degree of Consistency Required for a Federal Activity to be Consistent "To the Maximum Extent Practicable" With a State's Coastal Program Is Too Important to Be Made Outside the Context of an Actual Dispute.

Section 307(c)(1) of the CZMA is part of a broad program created by Congress to encourage cooperative federalism in the management of the nation's coastal resources. Once a state has received the approval of the Department of Commerce of its coastal zone management program, all federal activities directly affecting its coastal zone are to be conducted or supported, to the maximum extent practicable, consistently with the terms of that program. The purpose of this provision is to give coastal states comprehensive authority over the planning for and management of their coastal zones, which would be rendered piecemeal if federal activities, common on and along the nation's coastlines, were exempted from such authority. Thus, the interpretation of the consistency standard "to the maximum extent practicable" will affect the extent of the coastal states' authority systematically to protect their coastal resources and to plan for orderly coastal development. For this reason, cross-

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[2]No modification of the judgment of the Court of Appeals would necessarily be required if it were determined by this Court that the meaning of the phrase "to the maximum extent practicable" was not ripe for adjudication, as cross-petitioners contend. Insofar as that view is correct, the Court of Appeals' discussion of the phrase is dicta.

petitioners submit that this phrase should not be interpreted in the absence of a concrete factual dispute.

However, the Ninth Circuit discussed the meaning of "to the maximum extent practicable" even though that issue was and remains unripe for adjudication. The issue before the Ninth Circuit was the threshold question of whether an OCS lease sale "directly affects" the California coastal zone so as to call into play the consistency provisions of § 307(c)(1) and NOAA's regulations thereunder. Having decided that there was a direct effect, the Ninth Circuit held that Interior needed to perform a consistency determination before conducting the lease sale. The Court of Appeals also held that the lease sale had to be consistent "to the maximum extent practicable" with the California Coastal Management Program, amending the District Court's judgment that the federal lease sale activities must be conducted "in a manner consistent with California's Coastal Management Plan," DOI Pet. at 80a, which omitted the statutory qualifier "to the maximum extent practicable." DOI Pet. at 19a.

Beyond this holding the Ninth Circuit need not and should not have gone. There having been no consistency determination by the Department of the Interior, there was no information before the court concerning the manner in which Interior intended to perform its consistency obligations nor any indication of California's reaction to Interior's performance of those obligations. In short, there exists no concrete controversy between Interior and California over any specific determination of consistency between Interior's proposed lease sale and the terms of the California Coastal Management Program, nor, as a result, is there a factual context in which properly to resolve the requirements of the consistency standard.

Indeed, the question may never arise for Lease Sale 53, since the existence of an actual controversy will depend

upon the terms of a consistency determination Interior has yet to make, the unknown reaction of California to that document, and, perhaps, the outcome of mediation by the Secretary of Commerce. Were the consistency process allowed to proceed as provided by the regulations of the National Oceanic and Atmospheric Administration under § 307(c)(1), a very instructive administrative record would be compiled for future judicial determination of the proper construction of "to the maximum extent practicable," should such a determination become necessary. *See generally* 15 C.F.R. §§ 930.30-930.44.[3]

In the case of an OCS lease sale, the record would consist of the description of the particular sale itself, the supporting information required of the consistency determination, the relevant provisions of the state management program, the state's reasons for disagreement and its supporting information, and the record of the mediation proceedings, if any occurred. Without these final agency actions and the at-

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[3]In brief, NOAA's regulations require a federal agency to prepare and submit a consistency determination to a coastal state at least ninety days before final approval of an activity directly affecting that state's coastal zone. 15 C.F.R. § 930.34. This determination is required to indicate whether the proposed activity will be consistent to the maximum extent practicable with the state's coastal management program and must be based upon "an evaluation of the relevant provisions" of that program. 15 C.F.R. § 930.39(a). The determination must also include "a detailed description of the activity, its associated facilities, and their coastal zone effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement." *Id.; see also* 15 C.F.R. § 930.39(b), (c). If the affected state disagrees with the consistency determination, it must supply the federal agency with its reasons for disagreement and supporting information; it must describe how the activity will be inconsistent and what alternative measures, if any, would allow the activity to proceed consistently, to the maximum extent practicable, with the state's management program. 15 C.F.R. § 930.42(a). In cases of serious disagreement between a state and a federal agency regarding the consistency of a proposed activity, either party may call upon the Secretary of Commerce to mediate. 16 U.S.C. § 1456(h); 15 C.F.R. § 930.43.

tendant factual record, and in the absence of any concrete state-federal dispute over a completed consistency determination, the question of the meaning of "to the maximum extent practicable" has not properly arisen for judicial review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967).[4]

II.

The Court of Appeals Undermined the Balance of Cooperative Federalism Established by Congress in the Coastal Zone Management Act in Discussing the Phrase "To the Maximum Extent Practicable" Without Reference to the Proper Sources of Statutory Construction.

Even were the meaning of "to the maximum extent practicable" ripe for judicial determination, the Ninth Circuit's discussion regarding the phrase and the factors to be con-

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[4] *Abbott Laboratories* indicates that the lack of fitness of an issue for judicial review must be weighed against any hardship to the parties of withholding consideration in determining whether or not the issue is ripe. *Id.* Here, the opinion of the Court of Appeals itself makes clear that no hardship would result had it not engaged in its discussion of the meaning of "to the maximum extent practicable." The Ninth Circuit acknowledges that:

> The limit beyond which conformity with a state plan would not be practicable to the maximum extent cannot be precisely delineated. . . . [V]erbal formulas cannot eliminate the necessity of examining each situation with care and sensitivity to the concerns of the state and the nation.

DOI Pet. at 22a.

In other words, examining the meaning of "to the maximum extent practicable" in a factual vacuum is of little assistance in resolving concrete consistency disputes that may arise in the future. Interestingly enough, the Secretary of the Interior appears to agree: "[T]he Ninth Circuit's suggestions concerning a standard for consistency at the leasing stage are inherently vague." DOI Pet. at 19. While the federal petitioners offer this opinion to bolster their contention that no consistency determination is appropriate at the leasing stage, it plainly supports cross-petitioners' argument that the meaning of "to the maximum extent practicable" is not properly examined outside a specific factual setting.

sidered in its application would be incorrect. An examination of the relevant sources of statutory construction demonstrates that the Ninth Circuit's discussion runs counter to the comprehensive scheme of federal-state coordination that Congress created in the CZMA to allow states to assume a strong role in the management of their coastal resources.

NOAA, the agency responsible for overseeing the implementation of the CZMA, has long defined "consistent to the maximum extent practicable" to mean that federal activities directly affecting the coastal zone must be "fully consistent with [state coastal] programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations." 15 C.F.R. § 930.32 (emphasis added). The NOAA definition, which is due substantial judicial deference,[5] is fully in accord with the purposes and policies of the CZMA and the legislative history of § 307(c). H. Rep. No. 1049, 92d Cong., 2d Sess. 20 (1972); Conf. Rep. No. 1544, 92d Cong., 2d Sess. 15 (1972); *see also* S. Rep. No. 277, 94th Cong., 1st Sess. 36-37 (1975). In ignoring these critical sources of statutory construction, the Ninth Circuit has suggested a definition that would deprive coastal states of the strong management role Congress granted them in enacting the CZMA.

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[5]*See* DOI Pet. at 16a-18a; *American Petroleum Institute v. Knecht*, 609 F.2d 1306, 1310 (9th Cir. 1979).

CONCLUSION.

If the petitions for a writ of certiorari of the Secretary of the Interior and WOGA are granted, this cross-petition for a writ of certiorari should also be granted.

Respectfully submitted,

JOHN VAN DE KAMP,
Attorney General of the
State of California
N. GREGORY TAYLOR,
Assistant Attorney General
THEODORA BERGER*,
JOHN SAURENMAN,
Deputy Attorneys General
Attorneys for the State of California,
ROGER BEERS*,
KATHRYN BURKETT DICKSON
WILLIAM M. BOYD
Of Counsel
Attorneys for County of Humboldt, et al.
TRENT W. ORR*,
Attorney for Natural Resources Defense Council, Inc., et al.

**Counsel of Record*

SEE COMPANION CASE

Office-Supreme Court, U.S.
FILED
APR 13 1983
ALEXANDER L. STEVAS,
CLERK

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v.

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL CROSS-RESPONDENTS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL CROSS-RESPONDENTS

Respondents in Nos. 82-1326 and 82-1327 have filed a "conditional" cross-petition seeking review of the court of appeals' explication (Pet. App. 19a-23a [1]) of the statutory requirement that federal activities be consistent "to the maximum extent practicable" with approved state coastal zone management programs (see Section 307(c)(1) of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1456(c)(1)).

It is clear that the court of appeals felt obliged to give content to the phrase "maximum extent practicable" only because it concluded that outer continental shelf (OCS) lease sales are federal "activities directly affecting the coastal zone" within the meaning of the CZMA. Should this Court rule, in Nos. 82-1326 and 82-1327, that the Ninth

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[1] Pet. App. refers to the appendix to the petition in No. 82-1326.

Circuit erroneously interpreted the phrase "directly affecting the coastal zone," the remainder of the Ninth Circuit's decision would be of no consequence to cross-petitioners and would not require review by this Court. In other words, if the Court were to reverse the Ninth Circuit's construction of the underlying statutory terms, there would be no occasion to examine the manner in which that discarded interpretation should be implemented.

On the other hand, should the Court be inclined to agree with the lower court's basic construction of Section 307(c)(1) in the context of OCS lease sales, it would be logically appropriate for the Court to examine the practical consequences of that decision, just as the Ninth Circuit did. Accordingly, we do not oppose the granting of the "conditional" cross-petition.

We do not oppose the granting of the "conditional" cross-petition for a writ of certiorari, along with the petitions for writs of certiorari in Nos. 82-1326 and 82-1327.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1983

DOJ-1983-04

Office-Supreme Court, U.S.
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On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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OPPOSITION OF CROSS-RESPONDENTS

HOWARD J. PRIVETT
DONNA R. BLACK
MCCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017

E. EDWARD BRUCE*
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Western Oil & Gas Association, et al.

**Counsel of Record*

QUESTION PRESENTED

Whether the Ninth Circuit properly determined that under Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(1), the Secretary of the Interior has the ultimate authority to determine that federal activites associated with Outer Continental Shelf (OCS) leasing are consistent "to the maximum extent practicable" with a state CZMA program?

PARTIES TO THE PROCEEDING

The parties to the proceeding underlying this cross-petition are described in the certiorari petition filed by cross-respondent. (*See* WOGA petn. ii-v).

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OPPOSITION OF WESTERN OIL & GAS ASSOCIATION

Western Oil & Gas Association (WOGA), and the ten WOGA members who joined in its petition seeking review of the Ninth Circuit's decision in this case, *California* v. *Watt*, 683 F.2d 1253 (1982), rely upon their petition in No. 82-1327 for discussion of the opinions below, the jurisdiction of this Court, and the statement of the case. (*See* WOGA petn. 1-8).

THIS COURT SHOULD NOT GRANT THE CONDITIONAL CROSS-PETITION FILED BY RESPONDENTS

Respondents in Nos. 82-1326 & 82-1327 have filed a "conditional" cross-petition, seeking to have this Court review the Ninth Circuit's delineation of the respective authorities of the federal and state governments under Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(1). The lower court felt

obliged to decide this issue in the light of its conclusion that OCS lease sales are federal "activities directly affecting the coastal zone" within the meaning of that statute. Respondents/cross-petitioners admit that, in all likelihood, it is not necessary for the Court to grant their cross-petition and confess that they are filing it "out of an abundance of caution" to ensure that they can pursue their arguments concerning all aspects of the Ninth Circuit's construction of Section 307(c)(1).

Respondents/cross-petitioners have offered no compelling reasons for the Court's grant of their cross-petition.

First, it is readily apparent from both the Ninth Circuit's decision and from the arguments advanced by cross-petitioners, that the issue which they tender would be of no practical significance to them were the Court to reverse the Ninth Circuit's interpretation of the phrase "directly affecting." Should the Court take such action, there would rarely be any cases involving a state's assertion of authority under Section 307(c)(1) at the leasing stage of an OCS project.[1]

Second, should the Court agree, wholly or in part, with the Ninth Circuit's construction of Section 307(c)(1) as requiring the preparation of a consistency determination at the leasing stage of all OCS projects, it would, in all likelihood, like the Ninth Circuit, feel obliged to address

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[1] In the reply brief which WOGA has simultaneously filed in No. 82-1327 (p. 7 n. 1), we noted an instance in the past where the Department of the Interior had prepared a limited consistency determination in connection with OCS leasing under the federal and intervenor-petitioners' interpretation of the statute. However, it dealt with very limited impacts associated with the preliminary activities that occurred at the leasing stage of a unique OCS project.

the ramifications of this construction of the Act. Thus, should the Court not reverse the Ninth Circuit's construction of "directly affecting," it will have ample opportunity to discuss the issue of concern to respondents/cross-petitioners in the context of the issues raised by petitioners.

CONCLUSION

For the reasons stated above, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

HOWARD J. PRIVETT
DONNA R. BLACK
McCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017

E. EDWARD BRUCE*
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Western Oil & Gas Association, et al.

Of Counsel:

AMOCO PRODUCTION COMPANY
DONALD J. BRANNAN

ATLANTIC RICHFIELD COMPANY
JAMES R. COFFEE

CHAMPLIN REFINING CO.
J. D. HENRY

CONOCO, INC.
STEPHEN L. BAKER

ELF ACQUITAINE OIL & GAS CO.
TED G. WHITE

EXXON CORPORATION
MELINDA F. HARMON

GETTY OIL COMPANY
CLOY D. MONZINGO

GULF OIL CORPORATION
KENNETH M. BROWN

PHILLIPS PETROLEUM COMPANY
THOMAS M. BLUME

SHELL OIL COMPANY
DONALD F. GALLION

*Counsel of Record

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vs.

JAMES G. WATT, *et al.*,

Cross-Respondents.

BRIEF FOR THE CROSS-PETITIONERS.

TRENT W. ORR*
SARAH CHASIS
NATURAL RESOURCES DEFENSE COUNCIL, INC.
25 Kearney Street
San Francisco, Calif. 94108
(415) 421-6561

Attorneys for Natural Resources Defense Council, Inc.

ROGER BEERS*
KATHRYN BURKETT DICKSON
WILLIAM M. BOYD
Of Counsel
BEERS AND DICKSON
380 Hayes Street
Suite 1
San Francisco, Calif. 94102
(415) 861-1401

Attorneys for County of Humboldt, et al.

**Counsel of Record*

JOHN K. VAN DE KAMP
Attorney General
N. GREGORY TAYLOR
Assistant Attorney General
THEODORA BERGER*
Assistant Attorney General
JOHN A. SAURENMAN
Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, Calif. 90010
(213) 736-2191

Attorneys for State of California

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Question Presented.

Whether the Ninth Circuit erred in addressing the meaning of the phrase "to the maximum extent practicable," as used in § 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(1), when the statutory language had not yet been applied by the Department of the Interior in the context of this case, when there was no administrative or factual record, and when no issue regarding the meaning of this phrase has been raised, briefed or argued in the courts below.

Parties to the Proceeding.

This litigation was commenced by the filing of separate complaints by the State of California and several environmental groups. Parties plaintiff included the State of California (acting by and through the Governor, the California Coastal Commission, the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, and the California Department of Conservation), the Natural Resources Defense Council, Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale No. 53. A number of California cities and counties intervened as parties plaintiff in the litigation brought by the State: the Counties of Humboldt, Marin, Mendocino, Monterey, San Diego, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, and Sonoma, and the Cities of Brisbane, Capitola, Carmel-by-the Sea, Los Angeles, Morro Bay, Pismo Beach, San Francisco, San Luis Obispo, Santa Barbara, Santa Cruz, Santa Monica, and Seaside, as well as the Association of the Monterey Bay Area Governments.

Named as defendants, in addition to the Secretary of the Interior, were the United States Department of the Interior, the United States Bureau of Land Management, Edward Hastey (then Acting Director of the United States Bureau of Land Management) and Robert Burford (then Director Designate and now Director of the United States Bureau of Land Management). The Western Oil and Gas Association intervened as a party defendant in the litigation, as did Amoco Production Co., Atlantic Richfield Co., Champlin Refining Co., Chevron U.S.A., Inc., Cities Service Co., Conoco, Inc., Exxon Corp., Elf Aquitaine Oil & Gas, Getty Oil Co., Gulf Oil Corp., Phillips Petroleum Co., and Shell Oil Co. Amicus briefs were filed in the Ninth Circuit on behalf of the Coastal States Organization and the States of Alaska, Florida, Maine, Massachusetts, North Carolina, and Oregon.

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No. 82-1511

IN THE

Supreme Court of the United States

October Term, 1982

STATE OF CALIFORNIA, *et al.*,

Cross-Petitioners,

vs.

JAMES G. WATT, *et al.*,

Cross-Respondents.

BRIEF FOR THE CROSS-PETITIONERS.

Opinions and Judgments Below.

The Opinion of the Court of Appeals, DOI Pet. at 1a-33a, is reported at 683 F.2d 1253 (9th Cir. 1982).[1] The judgment of the Court of Appeals was entered August 12, 1982. DOI Pet. at 82a. The opinion of the District Court, DOI Pet. at 34a-78a, is reported at 520 F. Supp. 1359 (C.D. Cal. 1981). The judgment of the District Court was entered August 18, 1981. DOI Pet. at 79a-81a.

Jurisdiction.

After entry of the judgment in the Court of Appeals, a timely petition for rehearing was denied on November 10, 1982. DOI Pet. at 82a-83a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] *See* note 2, *infra*, for form of citation in this brief to the opinions below.

Statutes Involved.

Section 307(c) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c), is reproduced in Appendix E of the Petition for a Writ of Certiorari of the Secretary of the Interior at 84a-86a.

Statement of the Case.

This Court granted the petitions for writ of certiorari to review the decisions of the courts below that the Department of the Interior's (DOI's) proposed oil and gas lease sale on the Outer Continental Shelf (OCS) off central California, Lease Sale 53, is a federal activity "directly affecting" California's coastal zone within the meaning of § 307(c)(1) of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. § 1456(c)(1).[2] DOI steadfastly maintained in both the District Court and the Court of Appeals for the Ninth Circuit that the proposed lease sale did not "directly affect" the coastal zone, and DOI refused to comply with the consistency requirements of § 307(c)(1).[3] Thus, the only CZMA issue before the courts below was the threshold question of whether the lease sale was subject to those requirements. Only if the decisions below are upheld, and DOI complies with the consistency provisions of § 307(c)(1), would the requirement that the lease sale be "to the maximum extent

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[2]For the Court's convenience, we note at the outset several forms of citation that are used throughout this Brief. References to the Petition for a Writ of Certiorari of the Secretary of the Interior, *et al.*, are cited as "DOI Pet. at ...." All references to the opinions below are to those opinions as reproduced in the appendices of Interior's petition and will be cited as "DOI Pet. at ....a." References to the petition of the Western Oil and Gas Association, *et al.*, are cited as "WOGA Pet. at ...." Exhibits from the District Court Docket Sheet are cited by their title, their number in the Clerk's Record (C.R.) and their exhibit designation, *e.g.*, "California Coastal Management Program, C.R. 3, Cal. Exh. L-18 at 23." Documents from the Joint Appendix are similarly cited, with the abbreviation "J.A." replacing "C.R."

[3]The statutory language is set out in full at note 6, *infra*.

practicable" consistent with California's federally approved Coastal Management Program be called into play.

Nonetheless, in its opinion, the Ninth Circuit, *sua sponte*, discussed the general contours of compliance with the requirement that federal activities directly affecting the coastal zone be consistent "to the maximum extent practicable" with a state's coastal management program. DOI Pet. at 19a-23a. Cross-petitioners therefore present the question here of whether the meaning of the phrase "to the maximum extent practicable," as used in § 307(c)(1), is ripe and otherwise justiciable in the context of the instant dispute concerning the threshold applicability of § 307(c)(1) to DOI's proposed lease sale.

In order to appreciate the import of the requirement that federal activities directly affecting a state's coastal zone be consistent "to the maximum extent practicable" with that state's coastal management program, it is necessary to examine the congressionally-authorized coastal management scheme of which this requirement is a part. Under the provisions of § 306 of the CZMA, 16 U.S.C. § 1455, states are encouraged to prepare coastal management programs and submit such programs to the Secretary of Commerce for federal approval. Through these programs, coastal states are to provide for comprehensive management of their coastal zones, making provision for protection of important resources and for sound and orderly development along their coasts. Congress' aim in enacting the CZMA was to protect the "national interest in the effective management, beneficial use, protection, and development of the coastal zone." 16 U.S.C. § 1451(a). Congress found that development of the nation's coastal zone, including "extraction of . . . fossil fuels," was causing the loss of biological resources, open space, and the fragile shoreline itself. 16 U.S.C. § 1451(c), (d), (e).

Congress thus perceived a need to resolve the serious conflicts among important, competing uses of coastal resources and chose comprehensive state coastal management programs meeting the criteria of the Act as the proper vehicle to resolve these conflicts:

> "The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone. . . ."

16 U.S.C. § 1451(i). To promote the creation of state programs and to ensure the comprehensive coastal management authority of the participant states, Congress provided that, once a state management program is approved by the Secretary of Commerce, all federal agencies must conduct their activities directly affecting the state's coastal zone in a manner that is, *to the maximum extent practicable, consistent* with the state's approved program. CZMA § 307(c)(1), 16 U.S.C. § 1456(c)(1).

In November, 1977, the Secretary of Commerce approved the California Coastal Management Program (CCMP). In so doing, he found that "the views of Federal agencies principally affected" by the program had been adequately considered. Approval of the California Coastal Management Program at 26 (Nov. 7, 1977) (citing 16 U.S.C. § 1456(b)). He further found that:

> The management program provides for "adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature."

Id. at 18 (quoting 16 U.S.C. § 1455(c)(8)).

The American Petroleum Institute and the Western Oil and Gas Association (WOGA) sued to block approval of

the CCMP. *American Petroleum Institute v. Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). These oil industry groups brought their challenge out of a purported concern that California would use its consistency powers under the CCMP to preclude oil and gas activities along the coast. 456 F. Supp. at 922. They attacked the CCMP for its alleged failure to consider adequately the views of affected federal agencies and the national interest involved in planning for and siting energy facilities. 456 F. Supp. at 920-922. However, the district court and the Ninth Circuit both rejected these claims, finding that the Program did provide for adequate consideration of the national interest and of affected federal agencies' views. 456 F. Supp. at 922-927; 609 F.2d at 1313-1315.

Since the approval of the CCMP, California has maintained that DOI's adjacent OCS lease sales are federal activities directly affecting the state's coastal zone for which consistency determinations must be performed.[4] DOI, on the other hand, has asserted the contrary. Thus, in the final stages of preparation for Lease Sale 53, DOI issued a negative determination, stating that none of its activities up to and including the lease sale would directly affect the California coastal zone. Letter from Secretary Andrus to Michael Fischer, Executive Director, California Coastal Commission (Oct. 22, 1980), J.A. 66, Cal. Exh. L-12 at 1. DOI's refusal to conduct a consistency determination set the stage for the

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[4]The National Oceanic and Atmospheric Administration (NOAA), the Department of Commerce agency charged with administration of the CZMA, has promulgated regulations to ensure that the consistency requirements of § 307(c)(1) are carried out. 15 C.F.R. §§ 930.30-.44. The mechanism through which a federal agency must attest that its proposed activity will be consistent to the maximum extent practicable with the state's management program is termed a "consistency determination." 15 C.F.R. §§ 930.34, 930.37, 930.39. If a federal agency determines that its activity does not "directly affect" the coastal zone, it issues a "negative determination." *See* 15 C.F.R. § 930.35(d).

instant suit, because California objected to the leasing of certain offshore tracts in light of DOI's refusal even to attempt to comply with § 307(c)(1).

Thus, because DOI issued a negative determination, it never engaged in the formal process specifically promulgated by NOAA to ensure that federal agency activities directly affecting the coastal zone be consistent with state management programs to the maximum extent practicable. NOAA's detailed administrative process, described *infra* at 13-14, is intended to aid federal agencies and states in resolving disputes over the consistency of such federal activities with the state programs. 15 C.F.R. §§ 930.30-.44. Because DOI did not pursue this administrative route to ensure consistency for Lease Sale 53, never having conceded that it needed to perform a consistency determination, the meaning of the phrase "to the maximum extent practicable" was not an issue raised in or addressed by the District Court. Nor was the issue briefed or argued before the Ninth Circuit in DOI's appeal of the District Court's decision on the meaning of "directly affecting."

Nonetheless, the Court of Appeals discussed the meaning of the phrase "to the maximum extent practicable" as used in § 307(c)(1) in Part IV.E. of its opinion. DOI Pet. at 19a-23a. In particular, the Ninth Circuit suggested that this phrase indicates that a state's coastal program does not take "precedence when it would preclude the federal activity" and that the federal activity need not be as consistent as "possible" with the terms of that program. *Id.* at 19a. The Ninth Circuit also impliedly suggested that DOI has discretion to avoid consistency with the state's management program on the basis that the OCS activity "would be hampered or proscribed" by such consistency, or apparently on the basis of "the reasonableness of the state plan." *Id.* at 22a.

Timely petitions for rehearing on this portion of the Court of Appeals' opinion by the State of California, *et al.*, were denied November 10, 1982. DOI Pet. at 83a.

Summary of Argument.

The only issue properly ripe for adjudication, here and in the courts below, is whether Lease Sale 53 "directly affects" the California coastal zone within the meaning of § 307(c)(1) of the CZMA, (16 U.S.C. § 1456(c)(1)), and must accordingly be the subject of a consistency determination as required by NOAA's regulations implementing that section.[5] Only if this Court affirms the Ninth Circuit's ruling on the "directly affecting" threshold test of § 307(c)(1) will these consistency requirements be invoked.

The "maximum extent practicable" standard of § 307(c)(1) applies *only after* the "directly affecting" threshold test has been met, when a consistency determination is issued. Since DOI disputed the threshold application of § 307(c)(1), there cannot be (and has not been) a controversy over the application of this substantive standard as part of a consistency process that has never occurred. Thus while the Ninth Circuit properly addressed and affirmed the trial court's ruling that Lease Sale 53 directly affects the coastal zone and that DOI must perform a consistency determination, it erred in making gratuitous, hypothetical observations about how the "maximum extent practicable" standard should apply at some point in the future.

Indeed, as the Ninth Circuit itself acknowledged, there may never be any disagreement over whether consistency "to the maximum extent practicable" will be achieved in the consistency determination that it held DOI is required

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[5]NOAA's regulations addressing the "consistency determination" requirement are discussed in note 4, *supra*.

to perform. DOI Pet. at 23a. The hypothetical possibility of a future disagreement over this phrase does not give rise to an issue that is presently ripe for adjudication.

Moreover, the meaning of this requirement cannot be properly adjudicated in advance of its application and in the absence of a factual record developed in administrative proceedings thereon. NOAA has established procedures designed to ensure that any particular issues in dispute in the application of this requirement are pinpointed and factually developed, and that they are subjected to administrative review by the federal agency proposing to conduct the activity, the state whose coastal zone will be directly affected, and ultimately the Department of Commerce, if mediation of any outstanding dispute is sought. To attempt to set abstract parameters for this requirement in advance of this administrative application not only deprives the court of the factual material it needs to illuminate the meaning of the requirement in an actual controversy, but also intrudes upon a comprehensive scheme designed by Congress to promote cooperation between the federal agency and state involved.

The Ninth Circuit's observations on the meaning of "maximum extent practicable" illustrate the unwisdom of judicial efforts to discuss this matter in the absence of a ripe controversy. Lacking any briefing or factual record for its foray into this area, its opinion reflects no awareness that NOAA had promulgated regulations dealing with the very subject addressed, and that its observations departed considerably from the standard for "maximum extent practicable" set forth in those regulations, as well as the intent of Congress reflected in the legislative history of the CZMA. The Ninth Circuit also improperly suggested general parameters for the meaning of this statutory requirement, which would apply to all federal agencies, based in part on its reading of a statute that governs only the activities of DOI.

Had it awaited a concrete controversy, it would have been able to adjudicate this matter in a focused and informed manner. As it stands, the dicta in the Ninth Circuit's opinion addressing the meaning of "maximum extent practicable" should be disapproved by this Court.

ARGUMENT.

THE ISSUE OF THE PROPER DEFINITION OF THE REQUIREMENT OF FEDERAL CONSISTENCY "TO THE MAXIMUM EXTENT PRACTICABLE" UNDER § 307(c) OF THE COASTAL ZONE MANAGEMENT ACT IS NEITHER RIPE FOR ADJUDICATION NOR OTHERWISE JUSTICIABLE.

The Ninth Circuit properly affirmed the District Court's holding that Lease Sale 53 met the threshold test of § 307(c)(1) of the CZMA, as a federal activity "directly affecting" California's coastal zone, and thus should be subjected to the consistency requirements of that provision.[6] However, in Part IV.E. of its opinion, the court went on to discuss the degree of consistency with California's coastal management program that would be exacted by the standard of § 307(c)(1) that federal activities directly affecting the coastal zone must be consistent "to the maximum extent practicable" with such programs and further discussed how such determinations might be made. DOI Pet. at 19a-23a.

This portion of its opinion purported to respond to the District Court's injunction against leasing of particular tracts in Lease Sale 53 "until such time as the defendants comply with the requirements of the Coastal Zone Management Act . . . by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan." DOI Pet. at 19a. Only by assuming "*arguendo*" that this part of the District Court's injunction reflected an implied holding that consistency "to the maximum extent practicable" means simply conformity with a state's coastal man-

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[6]Section 307(c)(1) provides as follows: "Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. § 1456(c)(1).

agement program, did the Ninth Circuit reach its discussion of the meaning of that phrase. *Id.*

However, there is nothing in the District Court's opinion to this effect. The sole basis for the Ninth Circuit's assumption appears to have been the District Court's failure to include the statutory qualifier, "to the maximum extent practicable," in its injunction requiring activities on the litigated tracts to be consistent with California's program. Beyond repairing this oversight, which the Ninth Circuit did in a separate part of its opinion, there was absolutely no warrant for the Ninth Circuit's extended exegesis of the omitted phrase.[7] As that discussion was neither necessary to the Ninth Circuit's holding, nor to the relief it granted, it can only be rightly viewed as dictum.

Further, the issue in question had never been raised, briefed, or argued by any of the parties to this litigation, since the only question in the case was *whether* DOI was required to perform a consistency determination. Even had the "practicable" issue been raised, it would not have been, nor is it currently, ripe for a judicial determination since there is currently no concrete controversy over the meaning of the "practicable" clause, and such a controversy may never arise. Moreover, the case in its current posture lacks the detailed factual record that would be created were DOI and California to go through the comprehensive process

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[7]In Part IV.F. of its opinion, the Ninth Circuit corrected the District Court's failure properly to qualify its requirement of consistency with the CCMP by deleting the unqualified portion of the injunction altogether. What remains is an injunction forbidding leasing of the controverted tracts until a consistency determination is conducted. DOI Pet. at 23a-24a. This deletion is fully in keeping with the decision properly reached by the Court of Appeals — that the lease sale crosses the § 307(c)(1) threshold as an activity "directly affecting" the coastal zone — and requires no excursion into the parameters of consistency "to the maximum extent practicable."

established under the CZMA to promote the conduct of federal activities in a manner consistent to the maximum extent practicable with coastal states' federally approved management programs. For these and related reasons elaborated below, this Court should find the Ninth Circuit's discussion of the meaning of "to the maximum extent practicable" unripe and indicate that the issues discussed in Part IV.E. of its opinion should be reserved for proper resolution in a future case presenting a concrete factual dispute with a full administrative record.

A. Because There Is Not Now, and There May Never Arise, a Concrete Dispute Concerning the Meaning of "to the Maximum Extent Practicable," the Issue Is Unfit for Judicial Resolution.

A "basic rationale" of the ripeness doctrine is to prevent the courts from rendering premature decisions, "entangling themselves in abstract disagreements" about what the law would be on a hypothetical state of facts. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 51 U.S.L.W. 4449, 4451-52 (1983) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967)); *see also Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). Here there is no concrete controversy over the meaning of the "maximum extent practicable" standard as applied to the terms of Lease Sale 53. Such a controversy could *conceivably* arise — if ever — only *after* the DOI performs a consistency determination, which it has not yet done. And although the threshold issue of the meaning of "directly affecting" *is* ripe, the ripeness of one provision of a comprehensive legislative enactment does not thereby automatically ripen other "portions of enactment not *immediately* involved." *Communist Party v. SACB*, 367 U.S. 1, 71 (1961) (emphasis added); *see also*

Watson v. Buck, 313 U.S. 387, 402 (1941); *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 614-15, 639-40 (1980).

The consistency determination is the first of a series of steps that NOAA has provided by regulation to help work out potential disputes between federal agencies and states concerning the consistency of federal activities with approved state coastal management programs.[8] An understanding of NOAA's regulatory scheme is essential to a proper understanding of the present lack of ripeness for adjudication of the meaning of "to the maximum extent practicable."

In brief, NOAA's regulations require a federal agency to prepare and submit a consistency determination to a coastal state at least ninety days before final approval of an activity directly affecting that state's coastal zone. 15 C.F.R. § 930.34. This determination is required to indicate whether the proposed activity will be consistent to the maximum extent practicable with the state's coastal management program and must be based upon "an evaluation of the relevant provisions" of that program. 15 C.F.R. § 930.39(a). The determination must also include "a detailed description of the activity, its associated facilities, and their coastal zone effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement." *Id.*; *see also* 15 C.F.R. § 930.39(b), (c). If the affected state disagrees with the consistency determination, it must supply the federal agency with its reasons for disagreement

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[8]NOAA is the agency within the Department of Commerce that is charged with administering the CZMA. *See* 16 U.S.C. § 1453(16); *see also American Petroleum Institute v. Knecht*, 456 F. Supp. at 894; S. Rep. No. 92-256, 92nd Cong., 2d Sess. 22 (1971); H. R. Rep. No. 92-1049, 92nd Cong., 2d Sess. 15 (1972); H. R. Conf. Rep. No. 92-1544, 92nd Cong., 2d Sess. 12, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4822.

and supporting information; it must describe how the activity will be inconsistent and what alternative measures, if any, would allow the activity to proceed consistently, to the maximum extent practicable, with the state's management program. 15 C.F.R. §930.42(a). In cases of serious disagreement between a state and a federal agency regarding the consistency of a proposed activity, either party may call upon the Secretary of Commerce to mediate. 16 U.S.C. § 1456(h); 15 C.F.R. § 930.43. Throughout the regulations and NOAA's comments thereto, federal agencies and states are strongly encouraged to resolve their differences informally or through mediation. 15 C.F.R. §§ 930.111-.112.

Given this regulatory scheme, to which no resort has been made regarding Lease Sale 53, it is pure conjecture whether a consistency determination, once performed, would *ever* result in an actual controversy over "practicability" that would require judicial resolution. Just as the "case-by-case basis" of determinations under California's nuclear waste storage law in *Pacific Gas & Electric Co.*, 51 U.S.L.W. at 4452, meant that this Court could not know whether an actual conflict between state and federal law would ever arise, rendering a challenge to that provision unripe, so here the case-by-case determinations under § 307(c)(1) mean that we cannot know whether DOI will ever find Lease Sale 53 — or any other lease sale — inconsistent with the CCMP, and if so, whether DOI will further find consistency impracticable. Moreover, we cannot know whether California's ultimate position on Lease Sale 53 would materially diverge from DOI's on the issues of consistency and practicability, once there has been the opportunity for consultation, cooperation, compromise, and mediation provided for by Congress and NOAA.

In fact, a number of situations could occur in which no dispute over consistency to the maximum extent practicable

would arise: 1) In conducting the initial consistency determination, DOI might find Lease Sale 53 inconsistent in particular respects with the CCMP and might, *sua sponte*, amend the terms of the sale. In the words of the Court of Appeals: "In making the consistency determination, the Secretary of Interior undoubtedly will be guided by a spirit of federal/state cooperation." DOI Pet. at 23a. 2) DOI might find the sale consistent with the CCMP, and if California disagrees after receiving the DOI determination, the two parties might, in the give-and-take of the ongoing process of consultation and compromise established by the CZMA and the NOAA regulations, agree upon an amended lease sale that would satisfy both sides.[9] 3) Mediation by the Department of Commerce under § 307(h) might clear up any outstanding disagreements. 4) Finally, even if none of the above occurs, California might exercise its prerogative *not* to ligitate the issue.

Indeed, the Court of Appeals itself recognized that, absent a consistency determination, "it is not possible to know whether the Secretary of the Interior and the State of California will disagree on whether the required consistency determination reflects consistency 'to the maximum extent practicable.' " DOI Pet. at 23a. Thus, the case in its current posture presents at best only the hypothetical *possibility* of a *future* disagreement over the meaning of the "practicable"

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[9]*See* 15 C.F.R. § 930.42, comment: "In the event of a disagreement, the Federal and State agencies should utilize the remaining portion of the 90-day notice period to attempt to resolve their differences. In cases of continuing State agency disagreement, Federal agencies are encouraged to suspend implementation of the activity beyond the 90-day period pending resolution of the disagreement." 44 Fed. Reg. 37,149 (1979). *See also* 15 C.F.R. § 930.41, comment: ". . . this requirement is reiterated here to emphasize the opportunity for continued intergovernmental consultation in the event Federal and State agency concerns are not fully resolved within the 60-day period . . . of the State agency review." *Id.*

clause, and the Court of Appeals should not have reached out to discuss the meaning of that clause.

The current posture of this case is similar to that of *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, where this Court determined that the exact definition of the Occupational Safety and Health Act's "feasibility" clause should be deferred until "*after* the Secretary [of Labor] has made the threshold determination [found by the Court to be required by the Act]. . . . Unless and until such a finding is made, it is not necessary to address the further question of [the meaning of 'feasibility']." 448 U.S. at 615, 639 (emphasis added). Instead of rendering an advisory opinion on the meaning of feasibility, this Court properly deferred resolution of that important and intricate issue until it was cleanly presented by a concrete controversy.[10] *See American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490 (1981). As in *Industrial Union*, all that is necessary to the disposition is resolution of the ripe *threshold* question — in this case, whether Lease Sale 53 directly affects the coastal zone, and whether DOI must therefore prepare a consistency determination. Here, as there, it is unnecessary and inappropriate to opine on the meaning of another statutory term (there, "feasibility," here, "practicability"). To transplant the language of *Industrial Union*, "only after the Secretary has made [a consistency] determination" might the practicability issue arise.

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[10] "This Court should not express an opinion upon a question of statutory construction of much difficulty, of some doubt, and affecting numerous cases unless its determination is *necessarily* involved in the adjudication of the case at bar." *Sullivan v. Iron Silver Mining Co.*, 109 U.S. 550, 554 (1883) (emphasis added).

B. The Complete Absence of an Administrative Record and the Inadequate Factual Development Concerning the "Maximum Extent Practicable" Clause Counsel Against Current Adjudication of the Meaning of That Clause.

Even if it were assumed that an actual controversy over the meaning of the "practicable" clause will ultimately materialize and be litigated at some future date, the issue remains wholly unfit for *current* adjudication. If the question of whether Lease Sale 53 is consistent to the maximum extent practicable with the California Coastal Management Program were litigated at the end of the process provided by the NOAA regulations, the reviewing courts would then have the benefit of a full and informative factual record upon which to determine that issue.

Plainly, whether a specific federal activity is "consistent to the maximum extent practicable" with a specific state coastal management scheme is in substantial measure a question of fact dependent upon the features of the activity and the provisions of the program. Following NOAA's procedures would serve to delineate these matters sharply. The administrative record that would result from adherence to the NOAA regulations would, for instance, contain DOI's detailed description of the proposed lease sale, the facilities both onshore and offshore that would accompany it, and the effects of these on the coastal zone. DOI would also identify the specific provisions of the CCMP that it felt were relevant to its consistency determination. The state's response would pinpoint the issues in dispute by describing the ways in which it believed the activity to be inconsistent, providing factual information in support of its positions. The state would also suggest any alternatives that would allow the activity to proceed consistently with its program. If mediation occurred but proved unsuccessful, the record

produced in the process would nonetheless prove indispensable to the reviewing courts, by defining the specific points of disagreement and providing a basis for determining whether consistency "to the maximum extent practicable" had been achieved. Further, the mediation may provide the views of NOAA on the dispute. *See e.g.*, January 25, 1980 Memorandum from C. L. Haslam, General Counsel of the U.S. Department of Commerce to Secretary of Commerce on Mediation between California and the Department of Interior. Cal. Exh. L-7, C.R. 3; *reprinted in* H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 82-84 (1980).

In view of the wealth of factual information that the complete record of the consistency determination process would provide a reviewing court in determining whether a lease sale was, in fact, consistent to the "maximum extent practicable" with California's coastal program, the unwisdom of attempting to give meaning to that term in a factual vacuum is readily apparent.[11]

As this Court has recently reiterated, where "difficult issues of great public importance" are at stake — as are the questions of cooperative federalism posed by the "maximum extent practicable" clause here — it is wise to respect the prudential concerns underlying the ripeness doctrine: "[A] factual record discourag[es] the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances." *Illinois v. Gates*, 51 U.S.L.W. 4709, 4712 (1983). Ironically, the Court of Appeals opinion itself attests to the helpfulness of a factual record by acknowledging the "imprecision" of its own "verbal formula," offered outside the context of a live

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[11]Indeed, adjudication of even purely legal issues will often benefit significantly from the development of such a record. *See, e.g., Toilet Goods Association v. Gardner*, 387 U.S. 158, 163-64 (1967).

dispute over the "maximum extent practicable" standard. DOI Brief at 22a.[12]

Nor can it be seriously argued that the current "[un]fitness of the issue[] for judicial decision" is outweighed by any conceivable "hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner, supra*, 387 U.S. at 149. Petitioners have never even *raised* the issue of practicability, much less argued that deferred adjudication would work a hardship on them.[13] Surely their failure to raise and press the issue below precludes them from now claiming serious hardship from deferred judicial review.[14]

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[12]When petitioner WOGA and other plaintiffs brought suit in 1978 requesting "a full scale declaration of the parties' rights and obligations under the CZMA and the [California Coastal Management Program]," the court properly declined the invitation "because such declarations are best left to a time when a court has before it a case or controversy sufficiently identifiable to allow a specific issue application of a specific provision or provisions of the Act or Program." *American Petroleum Institute v. Knecht*, 456 F.Supp. 889, 897 (C.D. Cal. 1978), aff'd 609 F.2d 1306 (9th Cir. 1979).

[13]Significantly, cross-respondent DOI did not even submit an opposition brief to the cross-petition for certiorari. Although cross-respondent WOGA did submit a brief in opposition, its brief is singularly devoid of any substantive argument in response to respondents' ripeness concerns. Elsewhere, petitioner WOGA has gone even further in acknowledging the unripeness of the "practicability" issue in this case. In its reply brief before the First Circuit in *Massachusetts v. Watt*, Nos. 83-0506-MA, 83-0530-MA (D. Mass., filed March 28, 1983), *appeal docketed*, No. 83-1258, and No. 83-1265 (1st Cir.), WOGA argued that:

> It is unnecessary for the Court to explore the contours of the term maximum extent practicable. While the Ninth Circuit in *California v. Watt*, 683 F.2d at 1265, did find that this term permitted a federal agency to act in a manner that was not fully consistent with a state program, plaintiffs properly point out that the Ninth Circuit was not interpreting a particular federal consistency determination (Mass. Br. 31-33, n. 1).

Reply Brief of Intervenor-Appellant at 17 n. 16.
We agree.

[14]*See, e.g., Miree v. DeKalb County*, 433 U.S. 25, 34 (1977), where this Court declined to consider, on a grant of certiorari, an issue that had been neither pleaded, argued, nor briefed in either the federal district court or the court of appeals.

Indeed, the opinion of the Court of Appeals itself made clear that no hardship would have resulted had it not engaged in its discussion of the meaning of "to the maximum extent practicable." The Ninth Circuit acknowledged that:

> The limit beyond which conformity with a state plan would not be practicable to the maximum extent cannot be precisely delineated . . . . [V]erbal formulas cannot eliminate the necessity of examining each situation with care and sensitivity to the concerns of the state and the nation.

DOI Pet. at 22a. In other words, examining the meaning of "to the maximum extent practicable" in a factual vacuum is of little assistance in resolving concrete consistency disputes that may arise in the future. Interestingly enough, the Secretary of the Interior, in discussing Part IV.E. of the Court of Appeals opinion, appears to agree: "[T]he Ninth Circuit's suggestions concerning a standard for consistency at the leasing stage are inherently vague." DOI Pet. at 19. While the federal petitioners offer this opinion to bolster their contention that no consistency determination is appropriate at the leasing stage, it plainly supports cross-petitioners' argument that the meaning of "to the maximum extent practicable" is not properly examined outside a specific factual setting.

C. Premature Adjudication Would Unjustifiably Intrude on a Comprehensive Administrative Scheme, Designed by Congress to Promote Cooperation Between Federal Agencies and Coastal States.

Premature adjudication threatens to abort a careful scheme of cooperative federalism between state and federal agencies established by Congress and NOAA. In addition to "lead[ing] to piecemeal review which . . . is inefficient and upon completion of the agency process might prove to have been

unnecessary," premature review is likely to interfere with proper administrative functioning and denies to agencies an opportunity to correct mistakes, apply expertise, and iron out disagreements in a nonadversarial setting. *FTC v. Standard Oil*, 449 U.S. 232, 242 (1980). Here, neither the California Coastal Commission, nor DOI, nor the Department of Commerce (through mediation), has had the opportunity to apply the practicability standard in the context of an actual consistency determination concerning Lease Sale 53. By denying all three agencies the opportunity to resolve informally any disagreements that might arise, premature adjudication would be triply intrusive into the elaborate administrative process established by Congress and NOAA.

In contrast to *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82 (1977), where delayed resolution might have "frustrate[d] one of the key purposes of the [Atomic Energy] Act," one of the key purposes of the CZMA was to create a cooperative scheme that would encourage the states and federal agencies to work out their differences through a carefully crafted administrative process.[15] The Congressional declaration of policy in the CZMA's opening section is singularly clear on this point: "The Congress finds and declares that it is the national policy . . . to encourage the participation and cooperation of the public, state and local governments, and interstate and other regional agencies, as well as of the Federal agencies having programs affecting the coastal zone, in carrying

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[15]See Regional Rail Reorganization Act Cases, 419 U.S. 102, 144 (1974) ("structure of the [underlying] Act" is highly relevant to ripeness determination).

out the purposes of this chapter." 16 U.S.C. § 1452(4);[16] *see also* S. Rep. No. 92-753, 92nd Cong., 2d Sess. 4 (1972). Thus, the Ninth Circuit should have exercised self-restraint and stayed its hand in order to allow the congressionally approved and preferred process to run its course.

D. Lacking a Ripe Controversy Over the Meaning of "to the Maximum Extent Practicable," the Ninth Circuit Erred in Its Abstract Discussion of This Phrase.

Not only is the meaning of "maximum extent practicable" bereft of the requisite concrete factual situation, but the history of this case also demonstrates a complete lack of adverseness on this issue. The issue has never been raised — much less pleaded or briefed — by petitioners and cross-respondents.[17] By the same token, cross-petitioners did not have the opportunity to brief the issue prior to the decision of the Ninth Circuit.[18] Not surprisingly, lacking the proper

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[16]Congress has made it clear that it believes that the CZMA's scheme of cooperative federalism has worked well and should not be lightly disrupted. "With the exception of the ['directly affecting' dispute] state and federal agencies have not had serious problems in administering the consistency provisions and minor difficulties which have arisen have been remedied with familiarity of the process." H. R. Rep. No. 96-1012, 96th Cong., 2d Sess. 34 (1980). Case law is in accord. In *Puerto Rico v. Muskie*, 507 F. Supp. 1035, 1058-59 (D.P.R. 1981), the court pointed out: "It is the general intent of the CZMA and the regulations that any disagreements as to the consistency of the activity will be resolved through discussions — i.e., *mutual give-and-take*." (Emphasis added.)

[17]Petitioners and cross-respondents were defendants below. Cross-petitioners and respondents were plaintiffs below.

[18]The record in this case on the "maximum extent practicable" clause is thus trebly inadequate. There are no facts concerning any actual or concrete controversy over the meaning of this clause, no administrative proceedings or administrative record, and no briefs, motions, or litigation transcripts framing the issues for the courts below. For these reasons, the trial court properly refrained from addressing this issue, and the Ninth Circuit erred in straying from the only CZMA issue presented in the case — the meaning of "directly affecting."

materials, the Ninth Circuit fundamentally misconceived the meaning of this phrase.[19] In short, the Ninth Circuit acted without the "concrete adverseness [that] sharpens the presentation of issues upon which the court so largely depends for illumination of difficult" legal questions. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Had the Ninth Circuit awaited the completion of the process for determining consistency established by NOAA's regulations (described *supra* at 13-14) an administrative record would have been generated, and the issue would have been ripe for review. At the very least, any dispute over the "maximum extent practicable" clause that might have arisen during the consistency determination process would have led to the application of the NOAA regulation defining that very clause, and that application would thus have become part of the administrative record for the reviewing court. *See* 15 C.F.R. § 930.32, 44 Fed. Reg. 37,146 (1979). As it was, the Ninth Circuit rendered a series of advisory observations on the meaning of the statutory phrase that failed even to take account of the NOAA standard and in effect abrogated it. Cross-petitioners' purpose in raising this point is simply to offer further evidence that the circuit court should not have included these gratuitous remarks concerning the "maximum extent practicable" standard in its opinion, and that an analysis of the meaning and effect of this standard should be reserved for a case where the issue is ripe.

The Ninth Circuit was apparently unaware that NOAA had issued a definition of "maximum extent practicable"

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[19]For a more detailed discussion of the Ninth Circuit's erroneous observations regarding the "maximum extent practicable" standard, see California's "Petition for Rehearing and Suggestion for Rehearing En Banc" filed with the Ninth Circuit on August 25, 1982.

in final regulations. NOAA's regulations specifically provide:

> (a) The term "consistent to the maximum extent practicable" describes the requirement for Federal activities including development projects directly affecting the coastal zone of States with approved management programs to be *fully consistent* with such programs *unless* compliance is *prohibited* based upon the requirements of existing law applicable to the Federal agency's operations . . . .

15 C.F.R. § 930.32, 44 Fed.Reg. 37,146 (1979) (emphasis added).

The comment to this regulation explains that the term means: "to the fullest degree permitted by existing law." 44 Fed. Reg. 37,146 (1979) The regulations conclude that the effect of this section is to "require Federal agencies, *whenever legally permissible*, to consider State management programs as *supplemental requirements* to be adhered to in addition to existing agency mandates." *Id.* (emphasis added).[20] Thus, while NOAA's regulation countenances a departure from a state's management program only when "compliance is prohibited based upon the requirements of

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[20]NOAA's regulation is entitled to deference not only because of its acknowledged expertise *see, e.g.*, S. Rep. No. 92-526, 92nd Cong., 1st Sess. 15 (1971); H. R. Conf. Rep. No. 92-1544, 92nd Cong., 2d Sess. 12, *reprinted in* [1972] U.S. Code Cong. & Ad. News 4822; S. Rep. No. 94-277, 94th Cong., 1st Sess. 7 n. 5 (1975), but also because in amending the Act two years after NOAA's regulation was promulgated, Congress declined to alter § 307, explaining in part that "[g]enerally all consistency provisions have been *properly construed*." H. R. Rep. No. 96-1012, 96th Cong., 2d Sess. 34 (1980) (emphasis added). An examination of the history of this regulation demonstrates that NOAA analyzed the meaning of "maximum extent practicable" over a two-year period, from 1976 to 1978, including careful consideration of congressional intent, and analysis of state and federal comments. The regulation defining "maximum extent practicable" was issued in final form in March 1978. 43 Fed. Reg. 10510 (1978). In 1979, the word "directly" was substituted for "significantly," but this change had no effect on the definition. 44 Fed. Reg. 37,146, 15 C.F.R. § 930.32(a) (1979).

existing law applicable to the federal agency's operations,'' 15 § C.F.R. 930.32, the Ninth Circuit broadly suggested that a state's coastal program need not take ''precedence when it would preclude the Federal activity.'' DOI Pet. at 19a. The Ninth Circuit also listed as additional factors that apparently allow DOI to avoid consistency the extent to which OCS activity ''would be hampered or proscribed'' by such consistency, and ''the reasonableness of the State plan.'' DOI Pet. at 22a.

In these respects, the Ninth Circuit's views ignore not only the NOAA regulations but also the legislative history of the CZMA. The House Report on the 1972 CZMA makes clear that the kind of ''factors'' which the Ninth Circuit would leave to DOI discretion were in fact supposed to be ''ironed out'' prior to the federal approval of the state management program:[21]

> Subsection (c) provides that once a state management program has been approved pursuant to the procedures set forth in the bill, it is expected that *each federal agency* in conducting and supporting activities in the coastal zone *will see that those activities are consistent* with the program. Under the procedures established, the Secretary is required to consult with all cognizant federal agencies *prior to approval* of a program. It is anticipated that during this process *any aspects* or phases of the proposed program which are deemed by an agency to be *impractical to carry out* or support *will be brought to the attention of the Secretary* and steps will be taken at that point to iron out whatever difficulties appear to be established.

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[21]The ''maximum extent practicable'' language was added by the House in 1972. H.R. Rep. No. 92-1049, 92nd Cong., 2d Sess. 7 (1972). Since the Conference followed the House version of the bill, the House Report is entitled to substantial weight in construing Congressional intent.

H. R. Rep. No. 92-1049, 92nd Cong., 2d Sess. 20 (1972) (emphasis added); *see also* H. R. Conf. Rep. No. 92-1544, 92nd Cong., 2d Sess. 14, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4822, 4824.

Thus Congress expected that if federal agencies had any difficulties with the management program, they would be worked out *prior* to approval, not *afterward*. Once the state program is approved, Congress did not intend to vest the federal agency with the broad discretion implied by the Ninth Circuit.[22]

Moreover, without the benefit of any concrete controversy to frame the Ninth Circuit's exegesis of the phrase "to the maximum extent practicable," it was led to make general pronouncements on its meaning solely in light of DOI's OCS activities and their statutory framework. However, the "maximum extent practicable" standard applies to a variety of federal activities both onshore and offshore, within and without the coastal zone. *See* § 307(c)(2), 16 U.S.C. § 1456(c)(2) (federal developments *in* the coastal zone shall be consistent "to the maximum extent practicable" with approved state management programs).[23] Thus,

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[22]The only exception which Congress contemplated was for *unforeseen circumstances* which arose after program approval:

> *There may, however, arise, after the approval of the program, some circumstances not foreseen* at the time of its approval which may present a federal agency with an obstacle or situation which as a practical matter may prevent complete adherence to the approved program. *For that reason*, the committee felt that *some leeway should be written into the statute* with respect to activities of federal agencies in connection with approved programs.

H. R. Rep. No. 92-1049, 92nd Cong., 2d Sess. 20 (1972) (emphasis added); H. R. Conf. Rep. No. 92-1544, 92nd Cong., 2d Sess. 14, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4822, 4824.

[23]Falling within the mandates of § 307(c)(2) are such federal activities as flood control projects and harbor dredging by the Army Corps of Engineers, dock and quay construction by the Coast Guard and Navy, and stream channelization projects by the Soil Conservation Service.

the court improperly discussed this language in the CZMA, which applies to all federal agencies, by reference to another statute, the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA), 43 U.S.C. §§ 1331 *et seq.*, which applies only to DOI.[24] DOI Pet. at 20a-21a. The Court's gratuitous and uninformed discussion of the phrase in this case could have a spillover effect on many federal activities in every coastal state both onshore and offshore. Thus, by virtue of its failure to demand a factual record for its discussion, the court suggested "broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances," a practice that this court has expressly disapproved. *Illinois v. Gates*, 51 U.S.L.W. 4709, 4712 (1983).

In sum, there are a multitude of errors in the Ninth Circuit's discussion of the phrase "to the maximum extent practicable." Cross-petitioners wish to stress that these errors merely provide additional reasons the circuit court discussion should be disapproved as unripe. This is not the time to debate *how* consistency requirements should apply. The sole issue in this case is whether they *do* apply, *i.e.*, whether the "directly affecting" threshold test has been met. The question of the scope and effect of a consistency determination must await a case where such a determination has been issued.

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[24]Even here, the Ninth Circuit ignored the "savings clause" of OCSLAA — mentioned elsewhere in its opinion DOI Pet. at 18a-19a — which specifically states that OCSLAA was not intended to modify or repeal any provision of the CZMA. 43 U.S.C. § 1866. Indeed, the OCSLAA House Report makes clear that "[s]pecifically, nothing is intended to alter procedures under [the CZMA] for consistency once a state has an approved Coastal Zone Management Plan." H. R. Rep. No. 95-590, 95th Cong., 1st Sess. 153 n. 52 (1977) (discussing Section 19 of OCSLAA).

The Ninth Circuit also relied upon § 307(e) of the CZMA, which reserves federal authority over submerged lands. However, had it examined the NOAA regulation on "maximum extent practicable," it would have discovered that NOAA had specifically taken § 307(e) into account and found that this provision was not intended to affect the federal agencies' obligation under § 307(c)(1). 44 Fed. Reg. 37,146 (1979).

Conclusion.

For the foregoing reasons, cross-petitioners respectfully urge this Court to hold that the meaning of the phrase "to the maximum extent practicable" in § 307(c)(1) of the Coastal Zone Management Act, as discussed in Part IV.E. of the opinion of the Court of Appeals for the Ninth Circuit, DOI Pet. at 19a-23a, was and is unripe for determination in this case.

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General,
N. GREGORY TAYLOR,
Assistant Attorney General,
THEODORA BERGER,*
Assistant Attorney General,
JOHN A. SAURENMAN,
Deputy Attorney General,
Attorneys for the State of California.

TRENT W. ORR,*
SARAH CHASIS,
NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Attorneys for Natural Resources Defense Council, Inc., et al.

ROGER BEERS,*
KATHRYN BURKETT DICKSON,
WILLIAM M. BOYD,
Of Counsel,
BEERS AND DICKSON,
*Attorneys for County of Humboldt, et al.***

*Counsel of Record
**With assistance from
Akhil Amar and Robert Watkins

Office-Supreme Court, U.S.
FILED
AUG 19 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF CALIFORNIA, *et al.*,
Cross-Petitioners,

v.

JAMES G. WATT, *et al.*,
Cross-Respondents.

BRIEF OF CROSS-RESPONDENTS WESTERN OIL & GAS ASSOCIATION, *ET AL.*

HOWARD J. PRIVETT
DONNA R. BLACK
MCCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017
(213) 624-4200

E. EDWARD BRUCE*
BOBBY R. BURCHFIELD
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for
WESTERN OIL & GAS ASSOCIATION, *et al.*

*Counsel of Record

QUESTION PRESENTED

Whether the Ninth Circuit correctly determined, under Section 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1), that the federal government, not the States, has ultimate authority to determine whether the selection of Outer Continental Shelf tracts for leasing is, "to the maximum extent practicable, consistent" with a state CZMA program?

PARTIES TO PROCEEDINGS BELOW

The parties to this proceeding are described in the brief filed by the Western Oil and Gas Association, *et al.* (WOGA), as petitioners in No. 82-1327. (WOGA Br. i).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1511

STATE OF CALIFORNIA, *et al.*,
Cross-Petitioners,

v.

JAMES G. WATT, *et al.*,
Cross-Respondents.

BRIEF OF CROSS-RESPONDENTS WESTERN OIL & GAS ASSOCIATION, *ET AL.*

OPINIONS BELOW

The opinions of the lower courts are described in the brief filed by WOGA in No. 82-1327 (WOGA Br. 1).

JURISDICTION

Cross-petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1) (CZMA), is reprinted at WOCA Br. 2.

STATEMENT OF THE CASE

The statement of the case is fully set out at WOGA Br. 3-15.

SUMMARY OF ARGUMENT

Cross-petitioners improperly attempt to revise the question which they presented in their cross-petition so as to avoid this Court's scrutiny of the merits of that portion of the Ninth Circuit's opinion which they challenge. This tactic, like their ripeness argument, should not deflect this Court's scrutiny of the merits.

Cross-petitioners' argument that the only ripe issue before the Ninth Circuit was whether the Secretary of the Interior should have prepared a consistency determination for Outer Continental Shelf (OCS) Sale No. 53 is inconsistent with the position taken by California in its complaint that the state's views as to consistency should ultimately control the Secretary's selection of OCS tracts. It also ignores the broad relief granted by the district court, which was premised upon the state's exercise of final authority to determine consistency. Finally, cross-petitoners' ripeness argument cannot be reconciled with the position taken by California before the Ninth Circuit that it, not the Secretary, has "final responsibility for management" of all federal activities, insofar as they directly affect the California coastal zone.

Even if California had not thus raised the issue of State substantive authority under the CZMA, the Ninth Circuit would not have erred in addressing the implication of its affirmance of the district court's ruling that Section 307(c)(1) requires the preparation of a consistency determination. Under *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), the issue of authority to determine consistency was ripe for decision, since it involves purely a question of statutory interpretation and since withholding decision would have resulted in hardship to the parties. Cross-petitioners' suggestion that the dispute between California and Interior might be resolved without a

final adjudication of these issues is too speculative to call into question the ripeness of this controversy.

On the merits, WOGA cross-respondents continue to adhere to the view that federal paramountcy over the OCS, as reflected in both the CZMA and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (OCSLA), should be maintained by holding that the selection of OCS tracts for leasing does not "directly affect" the coastal zone. But assuming *arguendo* that it does, the Ninth Circuit correctly held that federal authority over the OCS was preserved in other respects by Section 307(c)(1) of the CZMA.

Three separate facets of the Ninth Circuit's holding permit maintanence of at least a measure of that authority. First, under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* (APA), courts should exercise only limited judicial review over compliance by a federal agency with the CZMA. Second, consistent with the principle uniformly recognized by the courts in applying the Endangered Species Act, 16 U.S.C. § 1531, *et seq.* (ESA), to OCS projects, the Secretary need not configure a lease sale to preclude all possible future inconsistencies that might arise as development proceeds, but instead need only set the project on a path capable of achieving future consistency. Finally, the requirement of Section 307(c)(1) that federal activities be, "to the maximum extent practicable, consistent" with state CZMA programs does not require federal officials to defer to a state's *post hoc* construction and application of the vague and general terms of its program.

The measure of federal paramountcy preserved by the Ninth Circuit's interpretation of Section 307(c)(1) is clouded and uncertain, and will result in years of litigation over OCS leasing. Thus, the Ninth Circuit's attempt to

preserve a measure of federal paramountcy over the OCS reinforces the conclusion that the Ninth Circuit erred in deciding that Congress intended Section 307(c)(1) of the CZMA to apply in any respect to the Secretary of the Interior's selection of OCS tracts for leasing.

ARGUMENT

I. Cross-Petitioners Improperly Attempt To Limit The Question Accepted By This Court For Review.

Under Rule 34(1)(a), a petitioner may not in its brief on the merits "change the substance of the questions already presented" in the petition for *certiorari*. The cross-petition for *certiorari* in No. 82-1511 set forth this question:

> "Whether the meaning of the phrase 'to the maximum extent practicable,' as used in § 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(1), is ripe for judicial determination, and, if so, whether the discussion of that term by the Court of Appeals for the Ninth Circuit is correct."

The federal cross-respondents expressed no opposition to the cross-petition. They took the position that, while a reversal of the Ninth Circuit's construction of "directly affecting" in Section 307(c)(1) would moot the portion of the Ninth Circuit's judgment challenged by cross-petitioners, an affirmance would make it "logically appropriate for the Court to examine the practical consequences of that decision, just as the Ninth Circuit did." (Fed. Mem. in No. 82-1511 at 2). The WOGA cross-respondents also conceded that this Court would wish to examine the consequences of an affirmance of the Ninth Circuit's "directly affecting" ruling. (WOGA Opp. in No. 82-1511 at 2-3).

Cross-petitioners now seek to change their question presented by limiting it to a ripeness challenge to that part of the Ninth Circuit's opinion with which they disagree. (Cross-Petrs. Br. i). However, under Rule 34(1)(a), having tendered the merits of the Ninth Circuit's resolution of that issue to this Court in their cross-petition, they are now obliged to accept this Court's merits ruling, should it decide that the issue was properly before the Ninth Circuit.

II. Having Decided That OCS Lease Sales Are "Activities Directly Affecting" The Coastal Zone, The Ninth Circuit Properly Considered The Implications Of That Decision For The Conduct Of The OCS Program.

A. California's Complaint And The Position It Took In The Administrative Process Required The Lower Courts To Decide Whether The State's Construction Of The CCMP Would Bind The Federal Government.

From the very beginning, California has sought relief in this case extending beyond a direction that the Secretary of the Interior prepare a consistency determination. In its complaint, California asked for an order declaring the Secretary in violation of the CZMA because he "refuse[d] to conduct said leasing of the 34 northern tracts in the Santa Maria Basin in a manner consistent with California's Coastal Management Plan [CCMP]." Calif. Complaint p. 32, ¶ 2(a).[1] Moreover, the State fully revealed its position that it has the determinative voice in deciding consistency issues by asking the court to retain jurisdiction over OCS Sale No. 53 until the California Coastal Commission (CCC) "concurs with any consistency

[1] In a separate part of its prayer for relief, California asked the court to require the Secretary of the Interior to prepare a consistency determination. Calif. Complaint p. 33, ¶ 2(c).

determination that the Secretary might make." (Complaint p. 22, ¶ 56).

California's request for an injunction mandating conformity with the CCC's interpretation of the CCMP faithfully reflected the position taken by the State in earlier administrative proceedings. On March 31, 1981, in continuing to challenge the inclusion of the disputed northern tracts in the Santa Maria Basin, the CCC declared that

> "even if Interior issues a determination of consistency as the law requires, the proposed decision is *not* consistent with the CCMP to the maximum extent practicable." (J.A. 113, emphasis in original).

Thus, California clearly declared that it had no interest in receiving a written consistency determination from the Department of the Interior, but instead desired that the Department adhere to California's construction of the CCMP.

B. The District Court's Final Judgment Was Premised On California's Ultimate Authority To Regulate OCS Leasing.

The district court's final judgment in two different respects granted California the relief it sought in its complaint and upheld the position that the CCC's views of consistency were binding upon Interior. First, the district court ordered the federal defendants to "comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan." (89a).[2]

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[2] As in WOGA's opening brief in No. 82-1327, citations to the lower courts' opinions are to the pages of the appendix to WOGA's petition for *certiorari*.

Second, the district court granted California's request for injunctive relief nullifying the bids on the disputed Sale No. 53 tracts, without preserving the status quo, as requested by cross-respondents, and providing the Department of the Interior with an opportunity to prepare a consistency determination with respect to those tracts. The district court's decision to grant California the broad nullification relief which it requested can only be understood as an acceptance of California's view that the CCC's determination of the consistency issue would ultimately be controlling.

C. All Parties Briefed The Case In The Court Of Appeals On The Understanding That It Involved The Substantive Issue Of State Authority Over OCS Leasing, Not Merely The Preparation Of A Consistency Determination.

WOGA and the federal cross-respondents emphasized in their briefs to the Ninth Circuit that the district court had embraced a construction of the CZMA which, in effect, vested final authority in state CZMA agencies to control the selection of OCS tracts for leasing. Thus, the first question presented in WOGA's opening brief in the Ninth Circuit was

> "[w]hether the lower court erred in interpreting Section 307(c)(1) of the [CZMA] in a manner that conflicts with the [OCSLA]?" (WOGA 9th Cir. Br. 2).[3]

In developing its argument on that question (*id.* at 14-20), WOGA contended that Section 19 of the OCSLA restricts States to submitting "recommendations" to the Secretary of the Interior regarding the "size, timing or location" of OCS lease sales, and thus "Congress clearly did not contemplate that a state agency, like the CCC,

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[3] *See also* Fed. Def. 9th Cir. Br. 48-50.

could through its own assessment of the national interest contradict the Secretary's decision." (*Id.* at 17). Indeed, the opening paragraph of the Introduction and Summary of Argument section of WOGA's brief stated that "clearly implicit in the [district] court's holding is the conclusion that state CZMA programs shall control the selection of OCS tracts for leasing." (*Id.* at 11).

In its responsive brief, California recognized that this case involves far more than the preparation of a consistency determination. Its own Statement of Issues included the question "[w]hether application of the Congressional definition of this threshhold [directly affecting] test to Lease Sale No. 53 required that the lease sale comply with the consistency requirements of Section 307(c)(1)." (Cal. 9th Cir. Br. 1).

In support of its position on this question, California asserted that

> "Congress intended to provide coastal states with federally approved coastal zone management programs with a special status; such states were to exercise greater decisionmaking authority regarding the coastal zone, and consequently, as to lease sales." (*Id.* at 52).

In response to what it referred to as "defendants' imagined specter of states relying on their coastal plans to arbitrarily prohibit federal OCS activities," California admitted that under its view of Section 307(c)(1) "the Act assigns final responsibility for management to the states." (*Id.* at 54). It limited federal agency authority to what it described as "significant power over the policy choices that a state incorporates into its coastal management plan," prior to federal approval when it becomes effective for purposes of Section 307(c)(1). (*Id.*). Thus, California's position was that, once a program has been

approved, the State has authority to prohibit federal OCS activities.

Having successfully sought relief from the district court upon a theory of state supremacy over OCS leasing, and having joined issue with the defendants below on the question of the substantive powers given to States by the CZMA, California cannot now attack the Ninth Circuit's decision because it went beyond scrutiny of the district court's requirement for the preparation of a consistency determination. Plainly, by both the nature of the final judgment that was before it and the arguments of the parties, the Ninth Circuit was required to address what it properly identified as "the premise on which [the district court's] order rests" which "appears to be that California's view of consistency ultimately will be controlling." (25a).

D. The Test For Ripeness Established By *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), Is Met In This Case.

Even if the judgment of the district court had not required it to do so, the court of appeals would not have erred in articulating the scope of the authority of the federal and state governments under Section 307(c)(1).

In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), this Court stated that the "basic rationale" of the ripeness doctrine

> "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the

> fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 148-49.[4]

The two aspects of the ripeness doctrine spelled out in *Abbott Laboratories* support the Ninth Circuit's clarification of the scope of the substantive authority granted to States by Section 307(c)(1).

First, the issue here is preeminently "fit . . . for judicial decision," because it is purely one of statutory interpretation. *See Abbott Laboratories*, 387 U.S. at 149 (issue proper for adjudication because "both sides have approached this case as one purely of congressional intent . . ."). Cross-petitioners assert that further development of the factual record would shed light on this issue (Cross-Petrs. Br. at 17-18).[5] However, as the Ninth Circuit itself recognized, such clarification of factual issues would be relevant to determining whether a particular OCS leasing proposal is, "to the maximum extent practicable, consistent" with a state's CZMA program, not the congressional intent underlying the statute. (24a). The Ninth Circuit expressly disclaimed any adjudication of the particular consistency issue in this case. (*Id.*).

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[4] "Controversies are ripe for judicial determination when the legal issues are appropriate for courts to decide and when hardship to private parties from lack of decision is substantial." K.C. Davis, *Administrative Law Treatise* § 21.00, at 305-06 (1982 Supp.).

[5] Cross-petitioners assert that publication of a consistency determination would have entailed "DOI's detailed description of the proposed lease sale, the facilities both onshore and offshore that would accompany it, and the effects of these on the coastal zone." (Cross-Petrs. Br. 17). However, as WOGA argued in the Ninth Circuit and as cross-petitioners never disputed, the environmental impact statement (EIS) for Sale No. 53, as well as other portions of the administrative record, set forth all of this information. (WOGA 9th Cir. Br. 37).

Second, had the Ninth Circuit withheld decision on the issue of the allocation of federal and state authority under the CZMA, it would have imposed great hardship on the parties and would have disserved the public interest. Sale No. 53 took place on May 28, 1981. Award of leases on the disputed tracts has already been delayed for more than two years. A refusal to address the substantive issues created by the Ninth Circuit's construction of Section 307(c)(1) would in all likelihood lead to additional years of delay, following the publication of a consistency determination, for the articulation of legal standards to adjudicate its significance. The continued idling of the companies' $44 million bonus bid deposits and the uncertainty about when, if ever, they will be able to conduct any activities on the disputed tracts impose a substantial hardship upon them. Such uncertainty also imposes a hardship on the Department of the Interior in its conduct of the OCS program.[6]

Moreover, Congress has expressed in the OCSLA, and this Court has recognized, the strong public interest in expeditious exploration and development of OCS resources. *See* 43 U.S.C. § 1802(1); *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 154 n.2 (1981). (WOGA Br. 44). Further delay in articulating legal principles to allow early resolution of the legal issues that cloud Sale No. 53 disserves that interest.

The ripeness cases cited by cross-petitioners do not support them. *Industrial Union Department, AFL-CIO*

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[6] When withholding decision would prolong the proceedings substantially and thus cause harm to the parties or the public interest, this Court has not hesitated to address issues that concern factual matters within the administrative record, even if they have not been considered by the court below. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 823-24 (1968).

v. *American Petroleum Institute*, 448 U.S. 607 (1980), in fact, supports the Ninth Circuit's resolution of the Section 307(c)(1) issue in this case. There, this Court held that the Occupational Safety and Health Administration must comply with Section 3(8) of the Occupational Safety and Health Act, 29 U.S.C. § 652(8) (OSHA), before issuing standards for benzene. Under cross-petitioners' reasoning, that holding disposed of the only ripe issue in the case, because the court could have remanded the case to the Secretary to reassess the need for Section 3(8) standards. However, apparently recognizing the practical necessity for instructing the Secretary as to the requirements of Section 3(8), the court went on to hold that, "before issuing any standard," he should "determine that it is reasonably necessary and appropriate to remedy a significant risk of material health impairment." 448 U.S. at 639.

The Court's further holding in *Industrial Union* that arguments under Section 6(b)(5) of OSHA were unripe highlights the error in cross-petitioners' reliance on that case. Those arguments addressed a different section of the statute, whereas the question in this case which cross-petitioners claim is unripe arises under Section 307(c)(1), the same portion of the statute that the court was forced to construe as a result of its "directly affecting" holding. Moreover, the issue under Section 6(b)(5) was whether the benzene standard actually adopted met the substantive criteria of the Act. The analogous question in this case would arise only after the Secretary had performed a consistency determination.[7]

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[7] The other cases relied upon by cross-petitioners involved constitutional issues, falling within the admonition that "[n]o rule of practice of this Court is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding

E. Cross-Petitioners' Speculation That The Issues In This Case May Be Resolved Without Further Litigation Does Not Destroy The Ripeness Of The Section 307(c)(1) Substantive Issue.

Cross-petitioners argue that numerous contingencies could occur that would obviate decision of the substantive issue in this case. (Cross-Petrs. Br. 15). Each is highly speculative and thus does not support deferring resolution of this issue.*

First, cross-petitioners suggest that the Department might accept the CCC's view as to consistency, presumably by deleting the disputed tracts. However, the CCC's interpretation of the CCMP as barring leasing of the disputed tracts was grounded in a "national interest" determination that such action was required to protect the southern sea otter. (WOGA Br. 9). The Secretary has already decided under both Section 19 of the OCSLA and the ESA, in a fashion which the lower courts upheld and California no longer challenges, that the national interest would be served by proceeding with the leasing of the disputed tracts (WOGA Br. 12, 14-15), and that the leasing and exploration stages of Sale No. 53 would not jeopardize the sea otter (WOGA Br. 4, 11-12).

California also suggests that the State might modify its position, leading to compromise and agreement upon the

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it.'" *Communist Party* v. *SACB*, 367 U.S. 1, 71-72 (1961). Moreover, even in cases involving important issues of constitutional law, this Court has, on occasion, gone beyond the recognition of a constitutional right in a given factual context and has declared general rules to guide lower courts. *See e.g.*, *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Roe* v. *Wade*, 410 U.S. 113 (1973).

* In *INS* v. *Chadha*, ___ U.S. ___, 103 S. Ct. 2764, 2776-77 (1983), this Court refused to hold that the "speculative" availability of "other avenues of relief" to Chadha constituted "a prudential bar to [its] consideration of the constitutional question presented . . . ."

terms for Sale No. 53 without further litigation. This seems very unlikely. As noted, the CCC has specifically found that leasing of the disputed tracts would "*not* [be] consistent with the CCMP," thus indicating that it would adhere to its view no matter what conclusion Interior reached in a consistency determination. (J.A. 113).

Third, cross-petitioners suggest that mediation by the Department of Commerce under Section 307(h) might end the dispute. But the mediation process would benefit from an authoritative construction by the Ninth Circuit or this Court of the scope of Section 307(c)(1). Indeed, the role envisioned by the Ninth Circuit for the Secretary of Commerce is to resolve disputes over application of the CZMA, not its interpretation. (25a).[9]

Finally, even when seeking rehearing with respect to that portion of the Ninth Circuit's opinion with which they disagree, cross-petitioners argued solely that the Ninth Circuit had wrongly decided the merits. Surely, on the record that was before it, with the positions of the parties staked out with the clarity described above (pp. 7-9), the Ninth Circuit did not err in proceeding to ad-

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[9] The prior history of mediation by the Department of Commerce gives little reason to believe mediation would be successful here. In 1979, California and Interior participated in mediation proceedings before Commerce with respect to OCS Sale No. 48 (Southern California). The subject of that mediation was the general applicability of Section 307(c)(1) to OCS leasing. The General Counsel of the Department of Commerce issued a final mediation report which, by and large, supported California's position on this question. However, the Secretary of Commerce disapproved the mediator's report on the ground that his "resolution" of the issue in favor of California represented a misunderstanding of his function. (Letter from Secretary Klutznick to Michael Fisher, Def. Ex. L-AA, C.R. 19). Thereafter, it was necessary for the courts in this litigation to decide the Section 307(c)(1) issue.

dress the issues which it held were "unavoidably" raised by its holding that a lease sale is an activity "directly affecting" the coastal zone. (21a).

III. The Ninth Circuit Correctly Decided That The Federal Government Has Final Authority To Determine Consistency.

In the final section of their brief (pp. 22-27), cross-petitioners suggest that the lack of ripeness of that portion of the Ninth Circuit's opinion which they challenge led the court to err in holding that the federal government has final authority to decide consistency issues. In advancing this oblique merits argument, cross-petitioners compare the court's interpretation of the phrase "maximum extent practicable" with regulations of the National Oceanic and Atmospheric Administration (NOAA), as well as a portion of the legislative history of Section 307(c)(1).

We, too, have questions concerning reliance upon the "maximum extent practicable" term in the statute as a basis for upholding federal paramountcy over OCS lands. (WOGA Br. 18-20). The arguments which we advanced below with respect to this issue were designed, as they are here, to demonstrate that Congress did not intend that the selection of OCS tracts for leasing was, in any measure, to be subjected to Section 307(c)(1) consistency review.

The Ninth Circuit rejected this argument, holding that this OCS leasing decision is subject to Section 307(c)(1). By virtue of this holding, the court of appeals was forced either to declare that the CZMA had destroyed federal paramountcy over the OCS or to locate such paramountcy elsewhere in Section 307(c)(1). In choosing the latter alternative, the Ninth Circuit relied upon the "maximum extent practicable" qualification to the consistency requirement of the statute.

Our defense of the lower court's decision in this respect must be qualified. But assuming *arguendo* that the selection of OCS tracts for leasing does "directly affect" the coastal zone, the Ninth Circuit clearly was correct in holding that federal paramountcy over the OCS was not destroyed by the CZMA.

Three separate aspects of the Ninth Circuit's construction of the CZMA bearing on the federal paramountcy issue can be extracted from its general reliance upon the phrase "maximum extent practicable." However, properly considered, two of the three are based on considerations which do not depend upon the meaning ascribed to that phrase.

First, the court of appeals held that "final authority to determine whether the required consistency exists . . . . must reside in the Executive Branch of the federal government subject, of course, to such judicial review as is appropriate." (21a). This portion of the court's holding does not depend upon attributing any particular meaning to the term "maximum extent practicable." That term bears upon the standard or degree of consistency which the federal agency must observe. It does not address the question of which organ of government—the federal agency conducting an activity; the state CZMA agency; the Department of Commerce in its mediation role; or a reviewing court—has authority to determine whether the standard has been met.

A second facet of the Ninth Circuit's holding is its recognition that in determining the consistency of OCS lease sales

> "the Secretary of [the] Interior may take into account that further consistency determinations will be made at the exploration, development, and production stages, when more complete information will be

> available. *See* 16 U.S.C. § 1456(c)(3). In other words, the lease sale need not be configured so as to preclude any possible future inconsistency from arising as development proceeds. The Secretary of [the] Interior, however, must set the leasing, development, and production activities on a path that is consistent with the state's plan to the maximum extent practicable in the light of the then available knowledge." (24a).

This, too, does not turn on the meaning of the term "maximum extent practicable." Permitting the Secretary to consider at the early stages of a project that there will be later opportunities for consistency review implies no particular laxity or rigor of the consistency standard.

That this is so is demonstrated by the several appellate decisions applying the unqualifiedly rigorous standard of Section 7(a) of the ESA, 16 U.S.C. § 1536(a),[10] to an OCS project. Those decisions permit Interior to base a "no jeopardy" assessment at the leasing stage of an OCS project upon the assurance that there will be later opportunities during the life of the project for further scrutiny of the jeopardy issue. *See North Slope Borough* v. *Andrus*, 642 F.2d 589, 609 (D.C. Cir. 1980):

> "Mandatory stage-by-stage review prevents the telescoping of any and every projected hazard to endangered life and to the environment into one overwhelming statutory obstacle [at the leasing stage of an OCS project]. The OCSLA standards are not less strict, they simply rely more on achieving compliance than on exacting proscription. By ensuring graduated compliance with environmental and endangered life standards, OCSLA makes ESA re-

[10] *See* TVA v. Hill, 437 U.S. 153 (1978).

> quirements more likely to be satisfied both in an ultimate and proximate sense."

See also pp. 23-24, *infra*.

Finally, the court held that Interior could consider "[s]uch factors as the extent to which leasing, exploration, development, drilling and production would be hampered or proscribed by conformity; the reasonableness of the state plan, as well as the terms of the particular proposed lease sale . . . ." in determining consistency to the "maximum extent practicable." (24a). This part of the Ninth Circuit's opinion does, of course, require scrutiny of this disputed phrase.

Cross-petitioners have advanced nothing in their opening brief to attack the first two of the major underpinnings of the court's ruling against them. Nonetheless, we will demonstrate that the Ninth Circuit correctly resolved the issues underlying these points, as well as the one which cross-petitioners have briefed.

A. Under Conventional Principles Of Administrative Law, The Federal Action Agency Has The Responsibility, Subject To Judicial Review, To Determine Issues Of CZMA Compliance.

Section 307(c)(1) of the CZMA is a directive addressed to federal agencies:

> "Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs."

The CZMA contains no citizens suit or other provisions defining the authority of courts to review federal decisions under the statute. That being the case, any lawsuit challenging federal agency compliance with Section

307(c)(1) must be brought under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* (APA). *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971). Indeed, the environmental group cross-petitioners invoked the APA to demonstrate their standing to seek judicial review of purported violations of the CZMA. (32a-36a).

Under the APA, as it applies to actions like this one, courts are to determine whether the challenged federal decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if the action failed to meet statutory, procedural or constitutional requirements." *Overton Park*, 401 U.S. at 414, citing 5 U.S.C. §§ 706(2)(A), (B), (C), (D).[11]

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[11] The "substantial evidence" review standard of the APA is applicable only to formal rule-making or to actions based on public adjudicatory hearings. 401 U.S. at 414-15. The Secretary of the Interior's disposition of OCS lands does not constitute formal APA rule-making. *California* v. *Watt*, 668 F.2d 1290, 1322 n.154 (D.C. Cir. 1981). Moreover, neither the OCSLA nor the CZMA require the Secretary to take action on the basis of a public adjudicatory hearing. As in *Overton Park*, 401 U.S. at 414, the only "hearing" that precedes an OCS leasing decision is the non-adjudicatory, quasi-legislative hearing which permits comment upon a draft environmental impact statement.

Congress has prescribed the "arbitrary or capricious" standard for judicial review of the Secretary of the Interior's decision to proceed with an OCS lease sale in a fashion contrary to a governor's recommendations. Section 19(d) of the OCSLA, 43 U.S.C. § 1345(d) (*see* WOGA Br. 24-27). Moreover, courts adjudicating other aspects of OCS leasing decisions have uniformly applied the *Overton Park* standard of review. *County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368, 1382-84 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); *Massachusetts* v. *Andrus*, 594 F.2d 872, 892 (1st Cir. 1979).

Accordingly, in judicial review proceedings involving claims under Section 307(c)(1), the federal action agency "is entitled to a presumption of regularity." *Overton Park*, 401 U.S. at 415. The reviewing court asks only whether "the Secretary could have reasonably believed that in this case" he or she had complied with the relevant statute, 401 U.S. at 416,—*i.e.*, here whether the Secretary's action was consistent to the maximum extent practicable with a state CZMA program. Thus, the Ninth Circuit clearly was correct in holding that the federal government has "final authority to determine whether the required consistency exists . . . subject, of course, to such judicial review as is appropriate." (21a).[12]

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[12] The views of a state agency concerning its CZMA program would be a part of the administrative record before the agency and thus a factor to be considered by a court in determining under the APA whether the federal action agencies' decision was arbitrary or capricious, an abuse of discretion or otherwise not in accordance with law. The weight to be given to those views is a function, at least in part, of the substantive standard against which the federal action agency's views are judicially reviewed. *See* pp. 25-35, *infra*, discussing this standard.

The record made before the Department of Commerce in a mediation proceeding might also be available to a court exercising APA review of a federal agency decision to proceed when confronted with a Section 307(c)(1) consistency claim. However, the Department of Commerce has previously (and we submit correctly) taken the position that its mediation function does not permit it to adjudicate disputes between state and federal agencies. (*See* p. 14 n.9, *supra*). Thus, it does not seem likely that the mediation process would result in a decision by Commerce that would be of assistance to the courts in such judicial review proceedings.

B. The Ninth Circuit Properly Determined That The Secretary Of The Interior Could Take Account Of Future Opportunities To Apply State CZMA Programs At Later Stages Of OCS Projects In Making A Consistency Determination At The Leasing Stage.

The Ninth Circuit's determined that the Secretary of the Interior has the responsibility, at the leasing stage, to set the project "on a path that is consistent with the state plan to the maximum extent practicable in the light of the then available knowledge," so that he need not configure the project, at the leasing stage, "to preclude *any* possible future inconsistency from arising." (24a). This view of applying the CZMA to OCS leasing is compelled by Congress' careful structuring of the OCSLA to ensure that OCS projects are not prematurely aborted due to speculative problems which might, but need not, arise in the future and which can, if they arise, be resolved later.

As recognized by case law both before[13] and after enactment of the 1978 OCSLA amendments,[14] as well as the legislative history of those amendments,[15] it is impossible at the leasing stage of an OCS project to address intelligently all of the environmental impacts which may arise during the 20-30 year life of the project. Prior to conducting an OCS lease sale, it is not known which tracts will be bid upon; which ones will be leased; of those leased, which tracts will be explored; which tracts explored will yield commercially recoverable deposits of hydrocarbons; or which tracts will contain only gas (the production of which creates little, if any, environmental risks). Similar-

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[13] *County of Suffolk*, *supra*, 562 F.2d 1368 (*see* WOGA Br. 29 n.24).

[14] *North Slope Borough*, *supra*, 642 F.2d 589 (*see* WOGA Br. 34, 45).

[15] H. Rep. No. 95-950, 95th Cong., 1st Sess. 164 (1977) (*see* WOGA Br. 30).

ly, it is not known whether oil, if discovered in commercial quantities, will be transported to shore via pipelines as opposed to tankers; whether onshore facilities will be required to support production and development operations; and, if so, where they will be located.

At the leasing stage, there is also little site-specific information available concerning the environmental resources of the area to be leased. It is infeasible for government or industry to conduct intensive surveys of every possible location for a drilling rig, platform, pipeline or onshore support facility at this point. It is similarly unrealistic to design such facilities at that stage to avoid or lessen impact on such resources. Indeed, one court has described efforts to do so as "a meaningless exercise."[16] It is only after leasing occurs, exploration commences, and later production/development plans are prepared that it becomes feasible to conduct site-specific surveys and then, if particularly vulnerable resources are likely to be impacted, to begin designing safeguards to protect them.[17]

Recognizing the complexity and host of uncertainties associated with an OCS project, Congress segmented the OCS process into a "pyramidic . . . structure," with clear Secretarial authority to ensure that each step provides

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[16] *County of Suffolk*, 562 F.2d at 1378 (*see* WOGA Br. 29 n.24).

[17] The administrative record in this case reveals that the Department of the Interior has recommended a research program aimed at exploring the possibility of physically translocating sea otters to form a new community in locations that would not be affected by oil spills in the Santa Maria Basin. The Department recited that this effort would cost in the range of $185,000 to $235,000 per year over a three-five year period and, if properly implemented, "could be completed prior to initiation of development and production, thus causing no delay" in the Sale No. 53 project. C.R. 85; A.R. 237w at 2.

for compliance with applicable laws, including the CZMA. It thus required "mandatory stage-by-stage review" to "prevent . . . the telescoping of any and every projected hazard to endangered life and the environment into one overwhelming statutory obstacle" that had to be confronted at the early stages of a project. Congress did this, *inter alia*, to discourage litigation "particularly at the pre-exploration, pre-development leasing stages, where the chances of harm to the environment are slim." See WOGA Br. 44-45 and cases cited therein.

We continue to believe that this argument demonstrates that the selection of OCS tracts for leasing does not "directly affect" a state's coastal zone and thus is not subject to Section 307(c)(1). But assuming otherwise, the argument at the very least supports the Ninth Circuit's articulation of the manner in which Section 307(c)(1) should be applied at the leasing stage.

The considerations which support applying CZMA programs at the leasing stage of an OCS project with full awareness of the applicability of those programs at subsequent stages have prompted courts similarly to apply the ESA to OCS projects. In *Conservation Law Foundation* v. *Andrus*, 623 F.2d 712, 715 (1st Cir. 1979), the court upheld the Department of the Interior's decision to proceed with the leasing stage of an OCS project, in the absence of a biological opinion with respect to the oil-spill related threats of jeopardy to endangered whales. The court justified this interpretation of the ESA on the ground that there would be adequate opportunity, prior to subsequent stages of the project which give rise to the threat of jeopardy, to apply the ESA to protect the species. The D.C. Circuit in *North Slope Borough* v. *Andrus*, *supra*, 642 F.2d at 609, later articulated at length the rationale for this "graduated" compliance with the ESA for OCS projects. *See* pp. 17-18, *supra*.

These cases were followed by the district court in this case when it rejected plaintiffs' ESA claim (82a-85a):[18]

> "Since the specific location, nature and size of facilities that might be necessary during these phases is not yet known, the potential jeopardy to the endangered species posed by these subsequent phases of OCS development was not determined. . . . Both [biological] opinions indicated, however, the necessity of reinitiation of consultation pursuant to § 7 of ESA prior to approval of development/production plans. . . . In light of the restrictions imposed on the FWS and NMFS by the limited quantity of available information, the decision to evaluate only the risks incurred during leasing and exploration and to reinitiate consultation prior to development and production cannot be held unreasonable." (84a) (citations omitted).[19]

These observations apply with equal force to the invocation of the CZMA in this case. Presently nothing is known about the "specific location, nature and size of facilities" that might be used on the challenged northern tracts. And just as with the ESA, there is a clear requirement for reinitiation of CZMA consultation prior to approval of plans for later stages of the project. Thus, the district court's recognition that, under the ESA, "[i]t may not be feasible to prescribe the proper safeguards [for

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[18] *See also* Village of False Pass v. Watt, 18 E.R.C. 2129 (D. Alaska 1983), *appeals pending*, Nos. 83-3990, *et al.* (9th Cir.).

[19] Cross-petitioners conceded the principle of graduated compliance articulated in the OCSLA/ESA case law by not appealing this portion of the district court's ruling to the Ninth Circuit, even though they did attack the district court's NEPA and OCSLA Section 19 rulings against them. (WOGA Br. 13).

endangered species] until the discrete stage is at hand" (87a) applies equally to the CZMA.[20]

Obviously, the Ninth Circuit was correct in holding that the obligation of the Department of the Interior under the CZMA is to set the project on a path capable of achieving consistency. The Department need not seek to guard against all possible later inconsistencies with state CZMA programs.

C. The Ninth Circuit Correctly Recognized That Section 307(c)(1) Permits The Department Of The Interior To Determine Consistency At The Leasing Stage Of An OCS Project.

The third aspect of the Ninth Circuit's "maximum extent practicable" ruling was its "reject[ion of the district court's] interpretation of the CZMA" as requiring "conformity to the program in the manner deemed appropriate by the state concerned." (21a). Instead, the court of appeals held that the Secretary of the Interior could consider a variety of factors in deciding whether an OCS leasing proposal was, "to the maximum extent practicable, consistent" with a CZMA program. (24a).

In so construing this term, the court of appeals emphasized that it could not "precisely delineat[e]" the degree of conformity required in any particular case. (24a). It stated that "verbal formulas cannot eliminate the necessi-

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[20] Admittedly, the district court sought to distinguish the ESA from the CZMA, holding that the "ESA does not focus on comprehensive planning." (87a). Without conceding this distinction between the two statutes, the Ninth Circuit correctly held that any "comprehensive planning" aspects of the CZMA can be fully satisfied by applying that statute at the leasing stage with full awareness of the later opportunities for CZMA review at subsequent stages of an OCS project.

ty of examining each situation with care and sensitivity to the concerns of the state and nation." (*Id.*).

California's challenge to this construction of the CZMA must be evaluated against the provisions of the CCMP upon which California has relied in this case. As revealed in our opening brief (WOGA Br. 8-10), those provisions are very general. One of them requires "special protection" for "areas and species of special biological or economic significance," without specifying the degree of protection or the location or nature of the species. Another directs that unidentified "environmentally sensitive habitat areas shall be protected," while the third provides the CCC with authority to override the prior two provisions and permit the location of industrial facilities in the coastal zone, if the "public welfare" would thereby be served.

The CCC extracted from these general provisions the proposition that OCS leasing in the Santa Maria Basin area could not occur within 12 miles of the southern sea otter's habitat. (WOGA Br. 9-10). The CCC did not explain how it defined this buffer zone; the CCC did not suggest either that this zone was dictated by the provisions of the CCMP upon which the CCC relied nor that it was determined on the basis of evidentiary data before the CCC.[21]

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[21] That no such evidentiary basis for this buffer zone exists is plainly revealed by the administrative record before the Secretary of the Interior. In the process of reconsidering Secretary Andrus' decision to lease all Santa Maria Basin tracts, the Office of Fish, Wildlife and Parks prepared an analysis for Secretary Watt which demonstrated that the general risks posed to the sea otter by potential oil spills during the development/production stage of the Sale No. 53 project would be reduced by only 5-6% as a result of deleting the northern Santa Maria Basin tracts. C.R. 85; A.R. 237w at 2. No findings were articulated by the CCC to dispute this analysis.

The consistency issue posed by the invocation of such provisions of a CZMA program does not require a court to determine the amount of latitude that a federal officer has to depart from a well-defined regulatory standard; the "maximum extent practicable" issue in this context is not comparable to one arising in a zoning variance proceeding. Instead, the issue posed is whether the federal officer can review the explicit terms of the state program in deciding the consistency issue or whether he or she instead must abide by the views of the state CZMA agency which, on a *post hoc* basis, has interpreted the state program to require a halt or specific modifications to the federal activity. When viewed in this light, it is clear that the Ninth Circuit correctly held that the Secretary of the Interior is not bound to conduct OCS leasing activities "in the manner deemed appropriate by the state concerned." (21a).

1. The Ninth Circuit decided the "maximum extent practicable" issue with full awareness of NOAA's definition of this term.

Cross-petitioners argue that, in defining "maximum extent practicable,"

> "the Ninth Circuit was apparently unaware that NOAA had issued a definition of 'maximum extent practicable' in final regulations." (Cross-Petrs. Br. 23).

However, the court of appeals' attention was specifically directed to that regulation during the briefing of the merits.[22]

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[22] California itself cited the regulatory definition of the term "maximum extent practicable" to the Ninth Circuit:

> "§ 307(c)(1) is a substantive requirement. The section requires that the federal activities be rendered consistent to the 'maximum extent practicable,' which means that they must be 'fully

Moreover, in seeking rehearing below, cross-petitioners argued that the Ninth Circuit had improperly construed the term "maximum extent practicable," in the light of the NOAA regulation and CZMA legislative history. The court denied that petition without comment, thereby indicating that cross-petitioners' discussion of "maximum extent practicable" brought nothing to the court's attention which required it to modify its opinion.

2. The NOAA "maximum extent practical" regulation does not require a federal agency to adhere to a state agency's view of consistency.

NOAA regulations do not support the view that a federal agency has no authority when confronted with an interpretation of a general provision of a state CZMA program, such as underlies California's opposition to Sale No. 53, to reach a decision at variance with the state's construction of its program. Subparagraph (a) of 15 C.F.R. § 930.32(a) provides:

> "The term 'consistent to the maximum extent practicable' describes the requirement for Federal activities including development projects directly affecting the coastal zone of States with approved management programs to be fully consistent with such programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations."

This regulation defines neither the term "consistent" nor the term "management program." Instead, it merely defines "consistent to the maximum extent practicable" as meaning "fully consistent with such programs."

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consistent.' *See* 15 C.F.R. § 930.32, 44 F.R. 37146." (Cal. 9th Cir. Br. 63).

Indeed, the federal defendants even quoted the operative language of this regulation to the court of appeals. (Fed. 9th Cir. Reply Br. 24).

The ordinary meaning of the term "consistent," as used in the CZMA, refers to something that is

> "marked by agreement and concord [opinions *consistent* with each other]; coexisting and showing no noteworthy opposing, conflicting, inharmonious or contradictory qualities or trends: COMPATIBLE—usu. used with *with* [drinking more hollands and water than is *consistent* with decorum] . . . [is your Aunt's romanticism always *consistent* with accuracy . . .]"[23]

Congress' choice of the term "consistent" implies only that a federal agency should not take action that conflicts with, contradicts or is inconsistent with a CZMA program.

Both the statute[24] and NOAA's regulations[25] define "management program" as a "comprehensive statement in words, maps, illustrations or other media of communications . . . setting forth objectives, policies and standards to guide public and private uses of lands and waters in the coastal zone." Thus, the regulation requires consistency with written objectives, policies and standards. There are many options available to a federal official who seeks to operate in a manner that is "consistent" with objectives, policies and standards as general as the ones relied upon by California here.

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[23] Webster's Third International Dictionary of the English Language (Unabridged) (3d ed. 1968).

Although the CZMA defines a number of its key terms, 16 U.S.C. § 1453, it contains no definition of the term "consistent."

[24] Section 304(12), 16 U.S.C. § 1453(12).

[25] 15 C.F.R. § 930.19.

3. Nothing in the CZMA or other NOAA regulations requires a federal agency to comply with one of the many possible interpretations that a state agency might later choose to impose upon a CZMA program's general policies.

Section 307(c)(1) stands in sharp contrast to Section 307(c)(3). In the latter statute, Congress specifically provided that a state CZMA agency must concur with the consistency certification made by an applicant for a federal license or permit as a precondition to the grant of that licence or permit.[28]

Having specifically provided States with this role in the CZMA process as it applies to the issuance of federal licences or permits, while remaining silent as to state CZMA agency participation in determining consistency for federal activities, Congress clearly implied that a federal agency assessing a consistency issue was not to be bound by the views of state agencies. The fact that Congress provided for Secretary of Commerce review of state actions under Section 307(c)(3), but provided for no

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[28] Section 307(c)(3) provides, in pertinent part:

> "No federal official or agency shall grant such person any license or permit for any activity described in detail in such [exploration or development/production] plan until such state or its designated agency receives a copy of such certification [of consistency with a state CZMA program] . . . and until—
>
> "(i) such state or its designated agency, in accordance with the procedures required to be established by such state . . . concurs with such person's certification and notifies the Secretary and the Secretary of the Interior of such concurrence; [or]
>
> * * *
>
> "(iii) the Secretary [of Commerce] finds . . .
>
> "(A) that each such activity which is described in detail in such plan is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security."

such review under Section 307(c)(1), strengthens this implication. As the Ninth Circuit held:

> "It would be anomalous for Congress to have provided the state with final authority unilaterally to nip these activities in the bud, by reason of the application of section 307(c)(1) to lease sales, in the face of its careful scheme in section 307(c)(3) to assure that a state cannot unilaterally stop the activity at later stages." (22a).

When preparing its CZMA regulations, NOAA noted the difference between the role given to state agencies pursuant to Section 307(c)(1) and 307(c)(3), and specifically refused to give States a determinative voice in consistency issues arising under the former section:

> "A number of State reviewers urged NOAA to require Federal agencies to cease action on proposed activities including projects directly affecting the coastal zone which the State agencies determined would not be consistent to the maximum extent practicable with the State's program. While the Act prohibits approval of Federal license and permit activities as well as Federal assistance programs in the event of an objection by the State agency, no similar directive is provided with respect to Federal activities including projects under dispute. Therefore, NOAA cannot require cessation of action in these instances." 41 Fed. Reg. 42878, 42881 (September 28, 1976).[7]

Other aspects of NOAA's regulations demonstrate that federal officials are not inflexibly bound by the construction imposed on a state CZMA program by a state agency. 15 C.F.R. § 930.39(a) requires that a consistency determination be "based upon an evaluation of the rele-

[7] NOAA went on to "strongly encourage" federal agencies not to proceed in the face of state disagreement in order to avoid litigation. (*Id.*).

vant provisions of the management program." The regulation does not suggest that a federal agency must first request or otherwise anticipate the interpretations which a state agency may impose upon the general provisions of the program. Indeed, under the regulatory scheme, 15 C.F.R. § 930.42, state agencies do not even recite their views of consistency until after they have received a consistency determination.

Accordingly, it is clear that a federal officer is not bound by a state agency's construction of the vague and general provisions of its CZMA program. Instead, in determining that a proposed action is consistent "to the maximum extent practicable" the federal agency can base its decision upon its good-faith interpretation of the program.*

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* The position set forth above is identical to the one set forth by certain industry-intervenors, not including WOGA but including some of the WOGA members that are before this Court, in *Massachusetts* v. *Watt*, Nos. 83-1258 & 83-1265 (1st Cir.). (*See* Cross-Petrs. Br. 19 n.13). There, as here, the industry parties dealt with contentions by a state government invoking its CZMA program that it, not the federal government, has the last word in infusing content into the vague and general terms of the program for the purpose of barring OCS leasing. Also there, as here, the industry parties argued that the plain meaning of the term "consistent" set forth in Section 307(c)(1) and the NOAA regulations does not vest final authority in state agencies to offer binding constructions of their programs.

The industry parties in *Massachusetts* v. *Watt* did not take the position that the construction of the term "consistent" to the "maximum extent practicable" was not ripe in that case, as implied by cross-petitioners. Similarly, nothing said to the First Circuit by those parties implied that the Ninth Circuit had improperly reached the "consistent" to the "maximum extent practicable" issue in this case. To the contrary, the industry parties repeatedly cited to the First Circuit the very aspect of the Ninth Circuit's ruling which cross-petitoners here seek to have reversed.

4. The policy issues raised by the application of the CCMP to OCS leasing were not resolved when the program was federally approved.

Cross-petitioners' attack upon the Ninth Circuit's holding that the Secretary of the Interior is not bound to conform to the CCMP "in the manner deemed appropriate by [California]" (21a) rests, in part, upon an argument that federal agencies are required to consult with the Secretary of Commerce, prior to his approval of a state program, so as to "iron out whatever difficulties" the program appears to create for federal agency programs. (Cross-Petrs. Br. at 25-26, quoting H.R. Rep. No. 92-1049, 92d Cong., 2d Sess. 20 (1972)). Apparently, cross-petitioners hold the view that, since the Secretary of the Interior failed to "iron out" such problems with respect to OCS leasing when the CCMP was approved, he forevermore is bound to operate in a manner fully consistent with the program as it may be interpreted by the State.

As cross-petitioners concede, however, Congress recognized that CZMA programs might not contemplate all future circumstances in which they would be applied, so that a federal agency might later be confronted with a CZMA issue that had not been anticipated at the time of program approval. "For that reason, the Committee [reporting out the CZMA] felt that some leeway should be written into the statute with respect to activities of federal agencies in connection with approved programs." (*Id.* at 26 n.22, quoting H.R. Rep. No. 92-1049 at 20).[25]

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[25] There is a further reason to extend such "leeway" to the Secretary of the Interior in connection with OCS leasing activities. The legislative history referred to in the text above was written at a time when Section 307(c)(1) was envisioned as applying only to federal activities "in the coastal zone." (*See* Cross-Petrs. Br. 25, quoting H.R. Rep. No. 92-1049; *see also* WOGA Br. 37-38). It may be relatively easy for federal agencies conducting such activities to antici-

Here, there was nothing set forth in the CCMP at the time of federal program approval that announced California's intention to invoke its program for the purpose of challenging the Secretary of the Interior's selection of OCS tracts for leasing. Although NOAA's regulations, 15 C.F.R. § 930.35(a), instruct state agencies that they "should list in their management programs Federal activities which, in the opinion of the State agency, are likely to directly affect the coastal zone and require a Federal agency consistency determination,"[30] California did not so list OCS leasing at the time it secured federal approval of the CCMP.[31] Moreover, when the CCMP was approved in November 1977 (WOGA Br. 6), the issue of whether the selection of OCS tracts for leasing was a federal activity within the meaning of NOAA's regulations was a subject

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pate later consistency disputes at the time of program approval. However, federal agencies conducting activities which have the attenuated connection to the coastal zone implied by the Ninth Circuit's construction of "directly affecting" are far less likely to anticipate later consistency issues at that time.

[30] 15 C.F.R. § 930.35(c), however, provides that the failure to so list a federal activity does not excuse a federal agency from preparing a consistency determination for an activity which directly affects the coastal zone.

[31] While California did not suggest that its program would apply to OCS leasing, the CCMP did reveal the State's intention to invoke consistency powers under Section 307(c)(3)(B) of the CZMA as to OCS exploration and development plans. (CCMP pp. 93-94, Ex. L-18, C.R. 3). Having emphasized its intention to apply Section 307(c)(3)(B) to the activities of OCS lessees, while remaining silent as to the application of Section 307(c)(1) to Interior's OCS leasing decisions, California clearly implied that its program would not apply to such decisions. For this reason, when WOGA and other industry representatives sought judicial review of the Secretary of Commerce's approval of the CCMP and alleged that it would impede OCS development, they focused solely upon the application of the program

of "disagreement" within the Executive Branch and was "still under consideration by the Administration."[32]

That being the case, there was no "ironing out" of the policy issues presented by the application of the CCMP to OCS leasing at the time of program approval.[33] Accordingly, acceptance of the argument that the Secretary of the Interior must now conduct OCS leasing off California, "in the manner deemed appropriate by the state concerned" (21a), would mean that California would be exercising control over OCS leasing without any federal oversight.[34]

CONCLUSION

As we have demonstrated, the Ninth Circuit was confronted with arguments as to the manner in which the CZMA impaired the exercise of federal paramountcy

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under Section 307(c)(3)(B) to OCS exploration and development activities. *American Petroleum Institute* v. *Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1606 (9th Cir. 1979). Thus, the courts that reviewed the approval of the CCMP never considered its application to the Secretary of the Interior's selection of OCS tracts for leasing.

[32] Promulgation of Final Rules, 43 Fed. Reg. 10510, 10512 (March 13, 1978).

[33] The legislative history of the CZMA makes it clear that it is the Secretary of Commerce's duty to "insure that the state, in developing [CZMA] programs has adequately considered the views of any federal agency, the activities of which would be affected by the state program." H.R. Rep. No. 92-1049, *supra* at 19. By failing to list the leasing of OCS tracts as a federal activity subject to its program, California did not give the notice to Interior that was necessary to precipitate an articulation of that agency's views of this matter.

[34] Having demonstrated that the term "consistent to the maximum extent practicable" as defined by NOAA permits flexibility in interpreting CZMA programs, it is not necessary to argue that this Court would *de novo* construe the term as providing flexibility to

over the OCS and was compelled by the complaint in this case and the district court's judgment to address that issue. Cross-petitoners' insistence here that those aspects of the Ninth Circuit's decision which rejected California's plea for the exercise of final authority over OCS leasing were unripe is thus without foundation. Should this Court affirm the Ninth Circuit's ruling on the "directly affecting" question, it too should address the implications of that ruling as bearing upon the federal paramountcy question.

The application of settled principles of administrative law support the Ninth Circuit's location of "final authority" within the Executive Branch of the federal government, subject to judicial review, to resolve consistency issues. Moreover, a proper respect for Congress' segmentation of the OCS process supports the Ninth Circuit's holding that CZMA consistency at the leasing stage need only set the project on a path capable of achieving consistency at later stages. Finally, nothing in the statute nor NOAA regulations requires a federal

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federal decision-makers. It is, however, appropriate to note that another court has interpreted the phrase "maximum extent practicable" as providing significant discretion to the Secretary of the Interior in the selection of the timing and location of OCS leasing under Section 18 of the OCSLA, 43 U.S.C. § 1344. *California* v. *Watt*, *supra*, 668 F.2d at 1317:

> "The Act recognized the difficult burden the Secretary must shoulder by stating that the selection of timing and location of leasing must strike the proper balance 'to the maximum extent practicable.' The Secretary must evaluate oil and gas potential, which can be quantified in monetary terms, in conjunction with environmental and social costs, which do not always lend themselves to direct measurement. Because of this, they must be considered in qualitative as well as quantitative terms.
>
> "Although the secretarial discretion we have described is broad, as a result of both the general wording of the statute and the nature of the task Secretary is asked to perform, the Secretary's discretion is not unreviewable."

agency to give conclusive weight to a state CZMA agency's *post hoc* interpretation of its CZMA program. A recognition by this Court of these principles would preserve at least a measure of federal paramountcy over the OCS.

The court should be aware, however, that preserving federal paramountcy through this approach, as opposed to a recognition that Section 307(c)(1) does not apply to the selection of OCS tracts for leasing, leaves open a number of questions that will have to be answered through subsequent litigation: What role is the Department of Commerce to play in resolving consistency disputes and what weight should be given by reviewing courts to its views; to what extent in judicial review proceedings should a court give weight to the views of a state agency as to the interpretation of its program; to what extent can a federal agency claim that it did not receive fair warning at the time of program approval that its activities would be subject to later CZMA scrutiny?

Moreover, even after these legal issues are settled and general principles are evolved, there would remain, as the Ninth Circuit itself foresaw, the task of applying these principles by "examining each situation with care and sensitivity to the concerns of the state and nation." (24a). Such an examination would, of course, have to be conducted by a federal court in litigation initiated by coastal states complaining of OCS leasing off their shores.

The future litigation created by the Ninth Circuit's interpretation of Section 307(c)(1) confirms the words of the court which upheld the CCMP, while describing the CZMA and its administrative scheme as leading inevitably to a "morass of problems." (WOGA Br. 45). WOGA submits that Congress could not possibly have meant to subject the selection of OCS tracts for leasing to this

scheme, when it said nothing in passing or amending the CZMA that in any way indicated that it intended to repeal the clearly delineated lines described in the OCSLA and in the Submerged Lands Act concerning proprietary control over the OCS.

Thus, our defense of that part of the Ninth Circuit's ruling which cross-petitioners attack here leads us to reiterate that the selection of OCS tracts for leasing should be held by this Court not to be a federal activity "directly affecting" the coastal zone within the meaning of Section 307(c)(1) of the CZMA.

Respectfully submitted.

HOWARD J. PRIVETT
DONNA R. BLACK
MCCUTCHEN, BLACK,
VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017
(213) 624-4200

E. EDWARD BRUCE*
BOBBY R. BURCHFIELD
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for
WESTERN OIL & GAS ASSOCIATION, *et al.*

*Counsel of Record

Of Counsel:

AMOCO PRODUCTION COMPANY
Donald J. Brannan

ATLANTIC RICHFIELD COMPANY
James R. Coffee

CHAMPLIN REFINING CO.
J. D. Henry

CONOCO INC.
Stephen L. Baker

ELF AQUITAINE OIL & GAS CO.
Ted G. White

EXXON CORPORATION
Melinda F. Harmon

GETTY OIL COMPANY
Cloy D. Monzingo

GULF OIL CORPORATION
Kenneth M. Brown

PHILLIPS PETROLEUM COMPANY
Thomas M. Blume

SHELL OIL COMPANY
Donald F. Gallion

Supreme Court, U.S.
FILED
OCT 21 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1511

In The
Supreme Court of the United States
October Term, 1983

STATE OF CALIFORNIA, *et al.*,
Cross-Petitioners,

vs.

JAMES G. WATT, *et al.*,
Cross-Respondents.

REPLY BRIEF FOR THE CROSS-PETITIONERS

TRENT W. ORR*
SARAH CHASIS
NATURAL RESOURCES DEFENSE COUNCIL, INC.
25 Kearny Street
San Francisco, Calif. 94108
(415) 421-6561
Attorneys for Natural Resources Defense Council, Inc.

ROGER BEERS*
KATHRYN BURKETT DICKSON
WILLIAM M. BOYD
Of Counsel
BEERS AND DICKSON
380 Hayes Street
Suite 1
San Francisco, Calif. 94102
(415) 861-1401
Attorneys for County of Humboldt, et al.

JOHN K. VAN DE KAMP
Attorney General
N. GREGORY TAYLOR
Assistant Attorney General
THEODORA BERGER*
Assistant Attorney General
JOHN A. SAURENMAN
Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, Calif. 90010
(213) 736-2191
Attorneys for State of California

*Counsel of Record

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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REPLY BRIEF FOR THE CROSS-PETITIONERS

ARGUMENT

I. THE ISSUE OF THE PROPER CONSTRUCTION OF THE PHRASE "TO THE MAXIMUM EXTENT PRACTICABLE," IS NOT RIPE FOR ADJUDICATION.

In their responses to the cross-petition, the Department of the Interior (DOI) and the Western Oil and Gas Association (WOGA) attempt to embroil this Court in a controversy that has never arisen over the meaning of the phrase "to the maximum extent practicable" in § 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U. S. C. § 1456(c)(1). Indeed, the unripeness of the Ninth Circuit's discussion of this point is highlighted by the cross-respondents' briefs.

As we explained in some detail in our opening brief, the standard "to the maximum extent practicable" in § 307(c)(1) can be meaningfully construed only in the context of a ripe controversy—that is, after the elaborate con-

sistency process triggered by the "directly affecting" threshold test has been exhausted, and the federal-state coordination envisioned by the CZMA has proved unavailing. First, the federal agency must examine the policies of the state's coastal zone management program and apply them to the activity at issue in light of the anticipated coastal zone impacts. As a result of this analysis, the federal agency must issue a "consistency determination." 15 C. F. R. § 930.39. Both before and after the issuance of the consistency determination, an extensive process of federal-state consultation and coordination is required in order to determine if intergovernmental agreement can be reached concerning whether the activity is consistent, or can be made consistent, "to the maximum extent practicable" with the coastal zone management program. *See* 15 C. F. R. §§ 930.34, 930.39, 930.42, 930.43, 930.111-.112. It is only when and if this administrative process has been exhausted without resolution, if the federal agency proceeds with the activity in spite of state objections, and if the state then decides to sue, that there can be any ripe dispute over the legal standard for federal compliance with the coastal zone management program, *i. e.*, consistency "to the maximum extent practicable."

Although none of the foregoing events has occurred, WOGA seeks to have this Court render an advisory opinion on such questions as what would be the appropriate standard of review of a consistency determination once made,[1] and whether DOI need only act in "good faith" in

[1]The cross-respondents attempt to obscure the significance of the "maximum extent practicable" requirement of § 307(c)(1) by focusing on the question of the standard of review for secretarial decisions concerning consistency under the Administrative Procedure Act, 5 U. S. C. §§ 701 *et seq.* (APA). WOGA C.R. Br. at 18-20; *see also* DOI C.R. Br. at 14 n. 9. WOGA seiz-

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fulfilling the consistency mandate of the CZMA in some hypothetical future case. WOGA Brief of Cross-Respondents (C. R. Br.) at 18-19, 32.[2] Cross-petitioners submit that all such questions, which necessarily invoke the meaning and application of the "maximum extent practicable" standard, should await a case where a consistency deter-

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es upon the "arbitrary or capricious" standard from § 706 of the APA as if this were the only standard a court could possibly look to in measuring the Secretary of the Interior's compliance with § 307(c)(1). *Id.* Putting aside the question of whether this is indeed the applicable standard of review, it is apparent that WOGA's argument ignores another requirement of § 706 of the APA, that federal actions must be "in accordance with law." In short, WOGA obfuscates the substantive requirement of § 307(c)(1) that federal activities must be consistent "to the maximum extent practicable" with the federally approved management program, a body of substantive law, in its portrayal of review of a secretarial consistency determination as a purely procedural matter. *See* 15 C.F.R. § 930.32(a) ("[S]ections 307 (c)(1) and (2) and 307(e) require federal agencies . . . to consider State management programs as supplemental requirements to be adhered to in addition to existing agency mandates.").

[2]Similarly, in the trial court, WOGA sought to draw the court into ruling on the effect of the policies of the California Coastal Management Program. California argued that the question of whether Lease Sale 53 was *in fact* consistent with the program would not be ripe for review until DOI had conducted a consistency determination and the policies of the program had actually been applied. *See* C.R. 94, California Memorandum of Points and Authorities in Opposition to Defendants' Motions for Summary Judgment at 46-49; *see also American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 903 (C.D. Cal. 1978), *aff'd*, 609 F. 2d 1306 (9th Cir. 1979). The District Court declined to rule prematurely on the hypothetical effect of the coastal protection policies.

The federal cross-respondents do not take precisely the same tack as WOGA, no doubt because they wish to preserve for themselves the ability actually to issue a "consistency determination" before having the courts rule on the efficacy of such a significant federal decision.

mination has actually been prepared, and the controversy is ripe.[3]

A. Contrary To WOGA's Assertions, The State Of California Did Not Seek Any Relief Below That Would Require This Court To Construe The "Maximum Extent Practicable" Standard.

As part of their attempt to entangle this Court in an unripe dispute, cross-respondents seek to convey the erroneous impression that California sought in the lower courts to obtain a ruling that, through the CZMA, the state usurps the federal government's supreme authority over the OCS, and that the lower courts should require the lease sale to be absolutely consistent with the state's construction of its coastal zone management program.[4] WOGA

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[3]The inappropriateness of adjudicating the issue now is plainly demonstrated by the fact that if a suit were filed that solely requested a determination of the meaning of the phrase "to the maximum extent practicable," in advance of completion of the consistency process and the creation of an actual controversy, the court would doubtless reject the litigation as a request for an advisory opinion. The fact that an independent issue, the applicability of the consistency requirement to outer continental shelf (OCS) leasing, is disputed in this suit does not render the question of the meaning of the "maximum extent practicable" standard any more ripe, prior to its actual application.

[4]As California's complaint makes crystal-clear, California sought to have the District Court declare that Lease Sale 53 "directly affected" the coastal zone and thus required a consistency determination under § 307(c)(1). *See, e. g.*, Cal. complaint, J.A. 25 ¶ 49, 26 ¶ 55, 27 ¶ 59, 33 ¶ 2. We also requested that the court retain jurisdiction so that the judge familiar with the case could oversee compliance with consistency procedures. Cal. complaint, J.A. 26 ¶ 56.

There is nothing either in the complaint or in briefs below which indicates California sought a declaration of state supremacy on the OCS. To the contrary, California's Ninth Circuit Brief asserts that application of § 307(c)(1) to leasing "does not give states a veto power over OCS decisions." California Ninth Cir. Br. at 53. The same position has been taken in this Court. *See* Cal. Resp. Br. at 41-47.

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Br. at 5-7, DOI Br. at 3-4, 10-11. However, WOGA's claim that the state urged below its supremacy on the OCS is clearly belied by the record.[5] Cross-petitioners have never asserted that the states have any proprietary interest in the OCS or that they may override the will of Congress in determining the proper means of its management.[6] Cal.

(Continued from previous page)

WOGA also argues that the relief ordered by the District Court was "premised on California's ultimate authority to regulate OCS leasing." WOGA C.R. Br. at 6. WOGA bases this argument on the fact that in addition to ordering a consistency determination, the trial court states that all activities on the tracts at issue should be conducted consistently with California's program. *Id.* However, the only flaw in the District Court's statement was the failure to add the statutory qualification "to the maximum extent practicable." Since this qualification has now been inserted by the Ninth Circuit, there are no issues remaining in the case concerning relief. In any event, neither California nor the District Court ever suggested that the state had "ultimate authority to regulate OCS leasing."

[5]WOGA disingenuously quotes, out of context, California's discussion about the state having a "final responsibility for management," as if this reference were to management of the OCS. WOGA C.R. Br. at 8. However, the state has used this phrase throughout this litigation as a reference to its authority over the *coastal zone* (out to the three mile limit), not to state authority on the federal OCS. *See* DOI Pet. at 42a; 16 U. S. C. § 1453(1).

[6]Cross-respondents also assert that California failed to notify the federal government that OCS leasing was an activity likely directly to affect the coastal zone. WOGA C.R. Br. at 34. However, as DOI explicitly observes in its brief, the dispute between California and DOI has been of longstanding duration, dating back to 1977. DOI C.R. Br. at 7. (California's Coastal Zone Management Program was approved in 1977. *American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 893-4 (C.D. Cal. 1978), *aff'd*, 609 F. 2d 1306 (9th Cir. 1979).) DOI's longstanding knowledge of California's position is reflected not only in its recent brief, but also in its 1977 comments during the federal process approving California's program. *See* U. S. Department of Commerce Combined State of California Coastal Management Program and Final Environmental Impact Statement, C.R. 3, Cal. Exh. L-18, Attachment J at 20.

WOGA also criticizes the State for failing specifically to list in its program DOI's OCS leasing as an activity likely directly to

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Resp. Br. at 41-47, Local Gov't Resp. Br. at 17-22, NRDC Resp. Br. at 3-18. The very question in this case is the nature of the congressional intent in enacting the CZMA.

B. The Meaning Of The Phrase "To The Maximum Extent Practicable," As Used In § 307(c) (1) Of The CZMA, Is Not Presently Fit For Judicial Review.

Both DOI and WOGA attempt to portray the identification of the parameters of the phrase "to the maximum extent practicable," as it appears in § 307(c) (1) of the CZMA, as a purely legal question. DOI C.R. Br. at 17; WOGA C.R. Br. at 10. Based on this portrayal, they maintain that the issue is currently fit for judicial review. But it is ludicrous to assert that this general phrase has a sufficiently uniform meaning apart from any specific fact situation that its application to a given category of federal activity—here, DOI's offshore oil lease sales—becomes a "legal issue."

Nonetheless, the cross-respondents improperly seek a specific construction of the practicability standard for DOI's lease sales in the absence of a full administrative record upon which to make such a construction and contrary to sound general guidance on the meaning of the phrase in the regulations of the National Oceanic and Atmospheric Administration (NOAA) implementing the con-

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affect the coastal zone. WOGA C.R. Br. at 34. NOAA's regulations on this question which were not adopted until after California's program was approved, 43 Fed. Reg. 8415, 10517, 10520 (1978), make clear that the listing of federal activities outside the coastal zone is optional, and that, in any event, the failure to list a federal activity does not excuse the federal agency from preparing a consistency determination. *See* 15 C. F. R. § 930.35 and comments thereto, 44 Fed. Reg. 37147 (1979). The important thing is that the state notify the federal agency that the particular activity at issue (in this case, Lease Sale 53) directly affects the coastal zone, and there is no dispute that this was done in this case. *See* 15 C. F. R. § 930.35(b).

sistency requirements of the CZMA.[7] 15 C. F. R. Part 930. DOI has chosen to ignore NOAA's regulations, seeking instead to have the courts create for it a new scheme of CZMA compliance. It is anomalous for DOI, while refusing to follow NOAA's consistency procedures, simultaneously to urge that, if its activity is found directly to affect the California coastal zone, the time is ripe for the courts to supercede the guidance on consistency compliance that NOAA has provided at Congress' behest.[8]

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[7]While both cross-respondents seem to acknowledge that NOAA's definition of "to the maximum extent practicable" is valid, neither gives more than lip service to that definition, taking instead positions contrary to it. DOI C.R. Br. at 19; WOGA C.R. Br. at 28-29. Both endorse the Ninth Circuit's suggestions as to the meaning of the phrase, which directly contradict the NOAA definition. For example, while the NOAA definition defines "consistent to the maximum extent practicable" as requiring federal activities "to be fully consistent with [state management] programs unless compliance is prohibited" by requirements of other federal laws, 15 C. F. R. § 930.32(a), the Ninth Circuit opined that

> The statute does not provide that a state's plan takes precedence when it would preclude the federal activity, or even that the federal activity must be as consistent with the plan as is *possible*.

DOI Pet. at 19a (emphasis in original).

And despite the creative efforts of the cross-respondents to convince this Court that the Court of Appeals had considered the NOAA definition when it wrote Part E of its opinion, DOI C.R. Br. at 18-19; WOGA C.R. Br. at 27-28, a reading of Part E reveals not a single reference, either direct or oblique, to that definition, let alone the careful consideration it deserved as the interpretation of the federal agency charged with implementing the CZMA. A court addressing the requirement of consistency "to the maximum extent practicable" at the proper time would not make this mistake, for the application of NOAA's definition to DOI's proposed lease sale would be plainly documented in the administrative record created during the consistency process.

[8]The Court should not be misled by cross-respondents' protestations that all that the Ninth Circuit discussed was a standard for consistency for OCS lease sales, not the consistency of

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Moreover, as cross-petitioners made clear in our opening brief, it is perilous to render advisory general pronouncements about the requirements of a provision governing all federal agencies' activities directly affecting the coastal zone by reference only to the laws relating to a single federal activity, DOI's offshore leasing program. *See* Brief for the Cross-Petitioners (C.P. Br.) at 26-27. Indeed, as the "maximum extent practicable" standard also appears in § 307(c) (2), which governs the consistency of federal developments *in* the coastal zone, proper interpretation of this provision is also jeopardized by a definition of the phrase that looks solely to DOI's OCS leasing.

Cross-respondents also assert that an administrative record already exists that provides the record necessary to the current resolution of the consistency standards to be applied to Lease Sale 53—the environmental impact statement and other documents prepared pursuant to the National Environmental Policy Act (NEPA) and the Outer Continental Shelf Lands Act (OCSLA). DOI C.R. Br. at 12-13; WOGA C.R. Br. at 10 n. 5. However, the record that exists is not the record that would be compiled if the Secretary complied with the requirements of the CZMA. The documents presently in the record simply do not address with any particularity California's coastal program or the requirements of the CZMA as these relate

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Lease Sale 53 itself with California's coastal program. DOI C.R. Br. at 14-15; WOGA C.R. Br. at 10. By so arguing, they seek to create the impression that the latter alone is unripe for determination at this time. However, the formulation of consistency standards for a particular federal activity is inextricably linked to the details of that activity, and of the state's coastal program. Such standards logically should not be addressed outside the NOAA process that would bring those details fully to light.

to Lease Sale 53; much less do they reflect DOI's application of the program to the lease sale. For this reason, these documents do not provide the proper factual background for the application of the practicability standard to an OCS lease sale.[9]

Nor are cross-respondents' attempts to distinguish *Industrial Union Department v. Marshall*, 448 U.S. 607 (1980), at all persuasive. That case stands firmly for the proposition that the construction of statutory duties consequent upon the meeting of a statutory threshold is not properly addressed until that threshold has been passed. Here, as in *Industrial Union*, the federal agency has not performed its threshold statutory duty: DOI has refused to acknowledge that Lease Sale 53 directly affects California's coastal zone and to conduct a consistency determination thereon.[10] In sum, the issue of the degree to

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[9]The invaluable information for judicial review that would result from allowing the state-federal consistency process to run its course is discussed more fully in Part D, *infra*. *See also* C.P. Br. at 17-18.

[10]Nonetheless, DOI argues that, in *Industrial Union*, the case was remanded with "standards and considerations the Secretary should weigh in making that eventual determination." DOI C.R. Br. at 16. However, the "determination" referred to is the *threshold* determination properly addressed by the Court. We agree with this Court's reasoning in *Industrial Union* that complex issues of law and fact that are contingent upon having met such a threshold are better left until the threshold is passed and an actual controversy arises based upon a fully developed administrative record.

WOGA makes an additional attempt to distinguish *Industrial Union*. WOGA C.R. Br. at 12. It argues as a critical distinction that the requirement of the Occupational Safety and Health Act that the Court held unripe was in a different section of the Act than the threshold requirement that the Court addressed, whereas here both requirements are in the same section of the CZMA. This distinction is, of course, irrelevant. The deciding factor in *Industrial Union* was the sequential nature of the duties, not their points of appearance in the statute. 448 U. S. at 615. Concerning this factor, there is no distinction between *Industrial Union* and the instant case.

which an OCS lease sale must be consistent with a state coastal management program in order to be consistent "to the maximum extent practicable" is not currently fit for judicial resolution.

C. The "Hardship" Of Which DOI Complains Could Not Be Relieved By A General Advisory Opinion On The Meaning Of "To The Maximum Extent Practicable."

DOI points to the injunction currently in effect as the basis of the hardship it claims justifies premature interpretation of the phrase "to the maximum extent practicable."[11] DOI C.R. Br. at 17. However, that injunction is not at all dependent upon an interpretation of that phrase, but rather on DOI's failure to acknowledge that its proposed lease sale meets the "directly affecting" requirements of § 307(c)(1), and to follow NOAA's consistency determination process. Were DOI to do so, a dispute over consistency "to the maximum extent practicable" might never arise, since any disagreement might well be resolved in that process. *See* Part D, *infra*.

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[11]Both DOI and WOGA identify as an element of the hardship they claim to suffer the frustration of what they purport to be the exclusive goal of the OCSLA—the expeditious exploitation of the petroleum resources of the OCS. DOI C.R. Br. at 17 n. 11; WOGA C.R. Br. at 11. However, the OCSLA recognizes and respects other values as well as oil exploitation and certainly does not mandate the development of oil resources in contravention of other federal statutory requirements. *See* Cal. Resp. Br. at 41 n. 70; NRDC Resp. Br. at 13-14; Local Gov't Resp. Br. at 41-43. Somewhat ironically, given its hardship argument, WOGA elsewhere fully acknowledges the OCSLA's concern for other values. WOGA Pet. Reply Br. at 13.

Further, the preparation of consistency determinations by DOI has in fact resulted in productive compromises between DOI and the states in a number of instances, see n. 12, *infra*, and in very little of the litigation that WOGA claims will stem from these determinations. Thus, the application of § 307(c)(1) to OCS leasing does not appear to be frustrating oil development on the OCS to any significant extent.

The hardship that DOI and WOGA claim supports the premature adjudication they seek is the possibility of future delay of Lease Sale 53 that might arise if DOI fails to conduct the sale consistently, "to the maximum extent practicable," with California's coastal management program. But the cross-respondents make no showing whatsoever that this potential hardship would be alleviated by a ruling now on the general contours of the phrase "to the maximum extent practicable." They cannot, for no abstract advisory opinion on the application of that standard to OCS lease sales would resolve the ultimate issue of whether Lease Sale 53 is properly consistent with California's program and thereby prevent the delays the cross-respondents fear. Indeed, they acknowledge as much in noting that this issue is not currently ripe for resolution. DOI C.R. Br. at 14-15; WOGA C.R. Br. at 10. This being the case, the cross-respondents have simply not demonstrated any hardship from which an advisory ruling now on the general application of the practicability standard to OCS oil leasing would save them.

D. Other Avenues To Resolve A Hypothetical Consistency Dispute Are Available To DOI And Must Be Exhausted Before The Issue Of Consistency "To The Maximum Extent Practicable" Is Properly Subject To Judicial Review.

DOI and WOGA both strongly resist the notion that any consistency dispute that might emerge from DOI's preparation of a consistency determination pursuant to NOAA's regulations could be resolved in the course of the process for handling such disputes that those regulations provide. DOI calls the prospect of agreement on consistency "remote at best." DOI C.R. Br. at 17. WOGA refers to as "highly speculative" the possibility of dispute

resolution at any of several steps in the process specifically designed for that purpose.[12] WOGA C.R. Br. at 13. In so arguing, cross-respondents once again evince their misunderstanding of the basic purpose of the consistency process, which was expressly created to encourage states and federal agencies to work out their differences without resort to litigation. *See, e. g.*, 15 C. F. R. §§ 930.38-.44.

In their insistence that resort to the NOAA process will be of no avail, they also disagree with the Ninth Cir-

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[12]Both DOI and WOGA argue that this Court should resolve the question of the meaning of "to the maximum extent practicable" because NOAA's consultative, cooperative process is sure to fail. However, this argument is belied by the fact that, since the opinion of the Ninth Circuit issued, DOI has begun preparing consistency determinations around the country, and the ensuing consultation process has in fact produced agreements with other states which have resolved the concerns arising from state coastal management programs. *See* Cal. Resp. Br. at 5. For example, in May 1983, DOI entered into a Memorandum of Understanding (MOU) with the State of Florida that extensively modified the South Atlantic Lease Offering of July 1983 in order to protect the coastal zone. This MOU provided for the deletion of certain tracts from the sale, for DOI funding of detailed physical oceanographic study of deep water tracts, and for postponement of exploration on hundreds of deep water tracts until twelve months of data from the physical oceanographic study had been collected and analyzed. The MOU also provided for the imposition of additional biological stipulations on all deep water tracts leased in the sale. These stipulations required a determination prior to exploratory drilling of the existence of biological habitats that required special protection.

DOI has also entered into memoranda of understanding with the Governor of Alaska regarding Lease Sale 57 (Norton Basin) and Lease Sale 70 (St. George Basin) that expressly addressed accommodation to Alaska's coastal zone management program. Moreover, in the majority of cases where DOI has issued consistency determinations, the states have concurred in DOI's finding that the sales are consistent with their coastal programs. Thus, it is clear that, when DOI is willing to enter into the federal-state coordination process contemplated by Congress, concrete results can be achieved.

cuit, which expressed its opinion that, absent a consistency determination,

> [I]t is not possible to know whether the Secretary of Interior and the State of California will disagree on whether the required consistency determination reflects consistency "to the maximum extent practicable." In making the consistency determination, the Secretary of Interior undoubtedly will be guided by a spirit of federal/state cooperation.

DOI Pet. at 23a. The Court of Appeals goes on specifically to encourage mediation by the Secretary of Commerce as a possible avenue of dispute resolution. *Id.* DOI and WOGA both seem to reject mediation out of hand. DOI C.R. Br. at 13 n. 8; WOGA C.R. Br. at 14 n. 9.[13]

At the same time, they assert that the NOAA process is unworkable because California has irrevocably made up its mind that leasing the contested tracts of Lease Sale 53 would be inconsistent with its coastal management program. DOI C.R. Br. at 17 n. 12; WOGA C.R. Br. at 14. However, DOI has steadfastly refused to provide California with a determination as to whether and how the lease sale is or is not consistent with California's program.[14] Accordingly, the California Coastal Commission

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[13]WOGA points to the unsuccessful attempt at mediation in Lease Sale 48 to bolster the proposition that there is "little reason to believe mediation would be successful here." WOGA C.R. Br. at 14 n. 9. However, as WOGA acknowledges, that mediation involved only the issue of whether a lease sale directly affects the coastal zone within the meaning of § 307(c)(1). It did not involve any issue of the extent to which Lease Sale 48 was consistent, "to the maximum extent practicable," with California's coastal program. This being the case, the results of that mediation have little predictive value for the success of mediation in a case in which the degree of consistency is in dispute.

[14]In the ordinary situation under § 307(c)(1), the federal agency would consult with the state to obtain its views, 15 C. F. R.

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had little choice but to make a preliminary assessment of consistency and tentatively determined that the leasing of the disputed tracts would be inconsistent with California's program. However, had DOI participated in the exchange and compromise intended to occur in the NOAA process, it is by no means certain that the parties would not have altered their positions. *See* n. 12, *supra*. We simply do not know what resolution might result were this process undergone.

Even if the cross-respondents' prophecies of a failure to resolve a consistency dispute during the NOAA process proved accurate (for reasons of self-fulfillment or otherwise), the process would have created a detailed administrative record. Not only would the record pinpoint those aspects of the proposed lease sale arguably inconsistent with California's coastal program and the specific provisions of the program involved, but it would also set forth the alternative means of achieving consistency that had been considered, such as specific lease stipulations or deletion of certain tracts, and explain why these were not practicable. In sum, the record would provide the specific factual setting essential to a full and final resolution of

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§ 930.37(a), comment to § 930.39, 44 Fed. Reg. 37148 (1979), and would then issue a consistency determination, to which the state would have an opportunity to respond. 15 C. F. R. § 930.41. However, since that process did not occur, the California Coastal Commission was forced to make its own assessment of whether it had substantive concerns over the leasing of the tracts at issue here. As a result of that assessment, the Commission determined that it had no objection to having the sale proceed as to the majority of the tracts (82 out of 111) in the sale, but that its substantive consistency concerns as to 29 of the tracts were sufficiently serious to require litigation over DOI's refusal to prepare a consistency determination. J.A. 120. (The Coastal Commission's staff report requests deletion of 31 tracts, but these were consolidated by DOI into 29 tracts. DOI Pet. at 45a.)

the issue of the degree of consistency required to meet the "maximum extent practicable" standard.

II. EVEN IF THE ISSUE OF THE MEANING OF THE PHRASE "TO THE MAXIMUM EXTENT PRACTICABLE" WERE RIPE FOR DECISION, CROSS-RESPONDENTS' SUGGESTED INTERPRETATIONS ARE PLAINLY INCORRECT.

While cross-petitioners submit that the meaning of the phrase "to the maximum extent practicable" in § 307 (c) (1) of the CZMA is not an issue presently ripe for adjudication, assuming *arguendo* that it is, we wish to address two patently erroneous suggestions advanced by the cross-petitioners concerning its interpretation.

First, WOGA contends that all that DOI need do in determining that a lease sale is consistent "to the maximum extent practicable" with California's coastal management program is base that determination on a "good-faith interpretation" of the "vague" provisions of the program.[15] WOGA C.R. Br. at 32. According to WOGA, no

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[15]That WOGA's contentions regarding the "vagueness" of the California program are unsupportable is made abundantly clear by *American Petroleum Institute v. Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F. 2d 1306 (9th Cir. 1979). In that case, California's coastal management program was attacked for being insufficiently specific to enable a project's proponent "to say with certainty that a given project must be deemed 'consistent' therewith." 456 F. Supp. at 919. The court rejected this notion, making clear that coastal programs are to provide performance standards and that the state coastal authority must play a central role in applying these to specific situations. *Id.* It is fruitless for WOGA to argue that DOI need only look to the program's general provisions and not consider the Coastal Commission's construction of its program in determining whether its activities are consistent "to the maximum extent practicable" therewith, given that the very form of the program intended by Congress and approved by the courts necessitates "interaction between the relevant state agencies and the user," here, the California Coastal Commission and DOI. *Id.*

attention is due the Coastal Commission's construction of the provisions of its plan. *Id.*

While WOGA couches the final section of its argument as support for the correctness of the Court of Appeals' examination of this issue, the conclusions it advances on the requirement of consistency "to the maximum extent practicable" are nowhere to be found in that opinion. WOGA C.R. Br. at 25-35. Nor could any court uphold the proposition advanced by WOGA, *i. e.*, that DOI need not act consistently with the provisions of California's program as required by § 307(c) (1), but merely need make a good-faith attempt to do so. A federal agency's compliance with congressional mandates is more than a matter of "good-faith interpretation."

Further, it cannot be logically argued that it is the federal agency that independently interprets the provisions of the state's program under § 307(c) (1) and (c) (2), without considering the state coastal agency's construction. Congress certainly did not intend in enacting the CZMA that federally-approved state management programs would become an amalgam of independent, potentially conflicting interpretations of their basic provisions by each federal agency whose activities triggered § 307(c) (1) or (c) (2).[16] This would ironically alter that section,

[16]Given that every federal agency whose activities directly affect the coastal zone must comply with § 307(c) (1) (and those proposing development in the coastal zone must comply with the identical requirements of (c) (2)), construction of the state's program by each federal agency without reference to the state's interpretation would lead to dozens of separate and unreconciled constructions of the program's requirements. Further confusion would result when the state coastal agency then interpreted the program in applying it to federal permittees under § 307(c) (3). Moreover, a comment to NOAA's regulations makes clear that the federal agency should consult the

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rightly known as the consistency provision, into one actively fostering myriad inconsistencies. Only if the state coastal agency, as the congressionally-designated agency with the greatest expertise in the implementation of the state's coastal management program, is afforded some degree of deference in its construction of that program—and only if the process of intergovernmental cooperation established by NOAA is followed in applying the provisions of that program to a proposed federal activity—can the program be applied with any uniformity.

WOGA also goes well beyond the Ninth Circuit decision in its discussion of the effect of consistency review at post-lease sale stages. WOGA C.R. Br. at 21-25. The Ninth Circuit merely stated that in determining consistency at the lease sale stage, DOI can take into account that additional consistency determinations are made at the subsequent stages. DOI Pet. at 22a.[17] WOGA attempts

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state coastal agency's construction of its program in making its consistency determination under § 307(c) (1):

> As a preliminary matter, Federal agencies are strongly encouraged to obtain the views and assistance of the State agency regarding the provisions of the management program which are related to the proposed activity and the information necessary to determine whether the proposed activity will be conducted in a manner consistent to the maximum extent practicable with the management program.

Comment to 15 C.F.R. § 930.39, "Content of a consistency determination," 44 Fed. Reg. 37148 (1979).

[17]Cross-petitioners have never suggested that consistency requirements at subsequent stages should be ignored. To the contrary, as the regulations implementing § 307(c) (1) clearly indicate, the consistency review is conducted "in phases based upon developing information, with each subsequent phase subject to Federal agency discretion. . . ." 15 C.F.R. § 930.37(c). Rather, our contention is that consistency review must be ap-

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to transform these remarks of the Court of Appeals into a repudiation of its holding that an OCS lease sale "directly affects" the coastal zone, and that a consistency determination must be done at the lease sale stage.

We have already responded to these arguments at length. Cal. Resp. Br. at 36-41, Local Gov't Resp. Br. at 28-43; NRDC Resp. Br. at 45-50. WOGA's argument is nothing more than a transparent attempt improperly to reargue the "directly affecting" issue in its cross-respondents' brief on "maximum extent practicable."[18]

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plied at the lease sale stage *and* at subsequent stages, particularly because some issues (*i. e.*, tract deletions and lease stipulations) can only be addressed at the lease sale stage. *See* n. 12, *supra*.

[18]In so doing, WOGA seeks once again to denigrate the significance of the lease sale stage, citing cases decided under other statutes such as NEPA and the Endangered Species Act. WOGA Br. at 22-25. Cross-petitioners have previously distinguished these cases and statutes. *See, e. g.*, Cal. Resp. Br. at 41 n. 69; NRDC Resp. Br. at 49. However, noticeably absent from WOGA's discussion of authorities is a recent OCS decision of the First Circuit Court of Appeals, *Commonwealth of Massachusetts v. Watt*, — F. 2d — (September 16, 1983 Slip Opinion, Nos. 83-1258, 83-1265). Although the issue decided by the appellate court arose under NEPA, the court stressed the significance of the lease sale stage in determining that a preliminary injunction was necessary to remedy an inadequate EIS. *Id.* at 14-20.

The court observed that had the Secretary been fully informed about the environmental effects of the sale, he might have *deleted* additional tracts at the lease sale stage. *Id.* at 6. The same result could be expected if the Secretary were fully informed at the lease sale stage of any inconsistency with the federally approved coastal zone management program. Indeed, this is exactly what has happened in other states. *See* n. 12, *supra*.

CONCLUSION

For the foregoing reasons, cross-petitioners respectfully urge this Court to hold that the meaning of the phrase "to the maximum extent practicable" in § 307(c)(1) of the Coastal Zone Management Act, as discussed in Part IV.E. of the opinion of the Court of Appeals for the Ninth Circuit, DOI Pet. at 19a-23a, was and is unripe for determination in this case.

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General,
N. GREGORY TAYLOR,
Assistant Attorney General,
THEODORA BERGER,*
Assistant Attorney General,
JOHN A. SAURENMAN,
Deputy Attorney General,
Attorneys for the State of California

TRENT W. ORR,*
SARAH CHASIS,
NATURAL RESOURCES DEFENSE
COUNCIL, INC.
Attorneys for Natural Resources Council, Inc., et al.

ROGER BEERS,*
KATHRYN BURKETT DICKSON,
WILLIAM M. BOYD,
Of Counsel,
BEERS AND DICKSON,
Attorneys for County of Humboldt, et al.

*Counsel of Record

Office-Supreme Court, U.S.
FILED
JUL 13 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1511

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

STATE OF CALIFORNIA, et al.,
Cross-Petitioners

vs.

JAMES G. WATT, et al.,
Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF FLORIDA

JIM SMITH
Attorney General

GERALD B. CURINGTON
BRUCE BARKETT
Assistant Attorneys General

Department of Legal Affairs
The Capitol
Suite 1501
Tallahassee, FL 32301
(904) 488-9935

DEBRA SWIM, Attorney
Office of the Governor
The Capitol
Tallahassee, FL 32301

DENNIS R. ERDLEY
Assistant General Counsel
Florida Department of Environmental Regulation
Tallahassee, FL 32301

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INTEREST OF AMICUS CURIAE

Amicus curiae, the State of Florida, to protect and preserve its interests as a Sovereign, and as parens patriae, on behalf of the citizens and residents of the State of Florida submits this brief in support of Cross-Petitioners, the State of California, et al.

The Coastal Zone Management Act of 1972 ("CZMA") was enacted by Congress to encourage the coastal states to develop and adopt comprehensive management programs for their coastal zones. Temporary funding to develop and administer the programs and a commitment on the part of the federal government to conduct its activities directly affecting the coastal zone in a manner consistent with the state programs were elements of the Act included by Congress to induce the states to seek federal approval of their Coastal Zone Management Plans. Florida's Coastal Zone Management Plan was

approved by the Department of Commerce on September 24, 1981. 46 Fed. Reg. 48742 (1981).

Florida has the longest coastline of any state in the continental United States. Its border is touched by the waters of the Gulf of Mexico and the Atlantic Ocean for 8,000-11,000 miles of its extent, depending on how many of its sinuosities and islands are included in the measurement. The predominantly low land elevation and high ground water level produce an interrelationship between the land and coastal waters which is more extensive than that of any other state. Brindell, The Proposed Florida Coastal Management Program, Environmental Regulation and Litigation in Florida 22.1, 22.8 (1981). From 1970 to 1980 population increases in coastal counties accounted for 72.4% of Florida's growth. Over that same time span the

number of tourists visiting Florida rose from 23.2 million to 35.9 million per year, a 54.7% increase.

The economic vitality of the state and its citizens is to a large extent dependent upon recreational and commercial activities conducted in coastal waters and adjacent land areas. Tourism is the leading industry in Florida and coastal areas are the State's major tourist attraction. In 1982, tourism produced 989 million dollars in sales tax revenue which constitutes 30% of total sales tax revenue. Sixty-seven percent of the State's general revenue is from sales tax. Florida's commercial and recreational fish industries are virtually dependent on coastal estuarine areas. A recent study found that five billion dollars are spent annually on activities associated with salt-water recreational fishing in Florida. Bell, Sorensen and

Leworthy, The Economic Impact and Valuation of Saltwater Recreational Fisheries in Florida, Sea Grant Report No. 47 (1982). Commercial fisheries are also of economic significance to the state. In sum, the State's economic vitality is largely dependent on the revenues and employment opportunities created by the commercial and recreational values of Florida's coastal areas.

The recently-proposed five-year leasing schedule indicates the Department of Interior intends to aggressively pursue OCS leasing. Only early consistency consultation will allow the State to adequately manage the coastal impacts and avoid delays in implementation of accelerated OCS leasing activities. As a state with federally approved Coastal Zone Management Plan, whose economy and environment are heavily dependent on its coastal

zone, Florida has a vital interest in the outcome of this litigation.

SUMMARY OF ARGUMENT

Activities of federal agencies which directly affect the coastal zone must be consistent with approved state coastal management programs to the maximum extent practicable. This Congressional mandate requires an initial determination of which activities conducted or supported by a federal agency "directly affect" the coastal zone.

The lower courts in this and other cases have determined that the decision to conduct a lease sale for rights to explore for and develop oil, gas and minerals in the Outer Continental Shelf ("OCS") is an activity which "directly affects" the coastal zone, and must therefore undergo consistency review pursuant to the Coastal Zone Management Act. These judicial determinations are in accord with the purpose of the Coastal Zone Management Act, the

operational scheme of the Act, and the direct expressions of Congressional intent that such pre-leasing decisions must comply with consistency requirements. Further, the National Oceanic and Atmospheric Administration, which is responsible for promulgating the implementing rules for the Act, reached a conclusion identical to that of the lower courts. Amicus Curiae urges this Court to affirm that the Coastal Zone Management Act requires that any decision to conduct a lease sale for Outer Continental Shelf lands must be consistent, to the maximum extent practicable, with approved state management programs.

The Ninth Circuit Court of Appeals also discussed the meaning of the phrase "to the maximum extent practicable, consistent with approved State Management Programs." It was unnecessary and inappropriate for the court to attempt a

discussion of that portion of the statute, since no consistency review had been conducted and no party had briefed the court on that issue. However, once it resolved to discuss the language, the Ninth Circuit provided erroneous guidance concerning the meaning of "to the maximum extent practicable, consistent with approved State Management Programs." Amicus submits the correct interpretation, and that which most closely reflects expressed Congressional intent, is found in 15 C.F.R. §930.32 (1983), the implementing regulation promulgated by the National Oceanic and Atmospheric Administration.

ARGUMENT I

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE DEPARTMENT OF INTERIOR'S OUTER CONTINENTAL SHELF LEASE SALE DECISION DIRECTLY AFFECTS THE COASTAL ZONE WITHIN THE MEANING OF THE COASTAL ZONE MANAGEMENT ACT.

A. A Narrow Interpretation of "Directly Affecting" Will Thwart the Purposes of the Coastal Zone Management Act.

The question of which activities meet the "directly affecting" threshold test set forth in §307(c)(1) [16 U.S.C. §1456(c)(1976)] must be interpreted in light of the purposes of the CZMA. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975)(quoting United States v. Heirs of Boisdore, 8 How. 113, 122 (1849)). The CZMA was enacted to incorporate state and national standards into a comprehensive scheme for the protection and beneficial use of the nation's valuable coastal resources. 16 U.S.C. §1451, 1452. A key element of this scheme is the voluntary adoption and implementation by each coastal state of a

management program which meets national coastal management standards and adequately considers the concerns of affected federal agencies. 16 U.S.C. §1452(i), 1455(c)(8), 1456(b). To encourage states to assume this substantial responsibility Congress offered the following opportunity: If a state, in consultation with affected federal agencies, adopts a coastal management program that meets national standards, then federal actions directly affecting the coastal zone will be conducted in a manner that is, to the maximum extent practicable, consistent with that program.

Implementation of the consistency requirement is essential to the success of the CZMA for two reasons. First, it encourages states to adopt and administer coastal management programs which meet national standards. Second, it influences

federal activities, many of which have profound effects on the coastal zone, to conform to national standards.

The comprehensive coastal management scheme established by the CZMA will be severely curtailed unless the Secretary's OCS leasing decisions are reviewed for consistency with federally approved coastal management programs. Final decisions as to the size and location of tracts to be developed, the timing of the sale, and the stipulations to which the leases are subject are made at the leasing stage. If the leasing decision itself is not reviewed for consistency there will not be another opportunity to evaluate the overall effects of leasing throughout an entire area. After the tracts are leased and a lessee seeks consistency certification for its individual exploration or development plan it is impossible for the state to evaluate

the cumulative effects of the lease sale. Consultation at the leasing stage allows the state and federal government to work together, before property rights to lessees attach, to reach a reasonable accommodation between the need to efficiently develop oil and gas resources and the need to assure maximum feasible protection for the na ion's coast.

Interpretation of the §307(c)(1) threshold test will effect the state's ability to deal with impacts of a variety of federal activities. Interior argues that an activity "directly affects" the coastal zone only when an immediate, physical coastal impact is directly threatened by the activity. Were the narrow reading urged by Interior adopted, federal activities with substantial coastal impacts could be excluded from consistency review, contrary to the intent of the

CZMA. Decisions regarding the design of federal projects which impact the coastal zone would not be evaluated for consistency until the final decision authorizing commencement of construction was made. For example, decisions concerning channel dredging, road and bridge construction, coastal construction projects such as ports and piers, dredge and fill operations or other activities actually occurring within the coastal zone would not be reviewed for consistency until the decision to begin operations was actually made, under Interior's theory. At that time federal agencies are likely to have spent extensive amounts of time and money in the design of a project which is not, to the maximum extent practicable, consistent with federally approved coastal management programs. Early consultation would allow federal agencies to incorporate design

features which reflect the national interest in the protection of coastal resources, and which accommodate the interests of the States.

In order to assure effective implementation of federally approved coastal management plans the CZMA requires federal/state consultation at the initial stages of federal activities which impact the coastal zone. 16 U.S.C. §1456a(c)(3); 1456b(a). The trial court found that states "are intended to be involved in every stage of the planning, from drawing board to execution" State of California v. Watt, 520 F.Supp. 1359, 1370 (C.D. Cal. 1981). The appellate court found that in order to effectuate the purposes of the CZMA "the state must be permitted to become involved at an early stage of a significant and comprehensive activity, such as Lease Sale 53, that will eventually have an appreci-

able impact on the coastal zone." State of Cal., Etc. v. Watt, 683 F.2d 1253, 1261 (9th Cir. 1982). Without such early consultation the state's ability to manage the coastal impacts of federal activities will be severely impaired and the incentive for states to implement a federally approved coastal management program will diminish. Further, the purposes of the CZMA to achieve state administration of a comprehensive management scheme which fosters coastal resource development without environmental damage would be utterly frustrated.

B. Congress Intended that "Directly Affecting" be Liberally Construed.

As indicated above, the purposes and policies of the CZMA would be frustrated were Interior's reading of §307(c)(1) adopted. Only a clear indication of congressional intent should override the

purposes and policy considerations of the Act. No such indication exists. In fact, Congress has addresed this issued, and has indicated that the "directly affecting" threshold test is to be liberally construed. Moreover, congress has specifically stated that the federal OCS lease decision is to be reviewed for consistency.

The CZMA was enacted in 1972 and amended in 1976 and 1978. Prior to enactment, while considering language applying consistency only to activities "in the coastal zone", the Senate stated:

> ...It is intended that any lands or water under federal jurisdiction and control, within or adjacent to the coastal estuarine zone, where the administering Federal agency determines them to have a functional interrelationship from an economic, social, or geographic standpoint with lands and waters within the coastal estuarine zone, should be administered consistent with approved State management program. S.Rep. No. 526, 92nd Cong., 1st Sess. 30 (Dec. 1971).

It is clear from this language that Congress intended federal activities in federal lands or waters outside the coastal zone to be reviewed for consistency if the "functional interrelationship" test was met. In 1972, the final Act substitued the phrase "directly affecting the coastal zone" for "in the coastal zone". The enacting conference committee did not discusss this apparent attempt to expand the scope of consistency review.

Legislative history demonstrates continous Congressional intent that OCS lease sale decions be reviewed for consistency. In discussing the consistency requirements for the OCS the 1975 Senate Report states:

> One of the specific federally related energy problem areas for the coastal zone is, of course, the potential effects of Federal activities on the Outer Continental Shelf beyond the State's coastal zones, including Federal authorizations for non-

> Federal activity, but under the act as it presently exists, as well as the S.586 amendments, if the activity may affect the State coastal zone and it has an approved management program, the consistency requirements do apply. S.Rep 277, 94th Cong., 1st Sess. 36-37 (1975); [emphasis supplied].

In 1976, in conjunction with other CZMA amendments the Senate Report found that:

> There is very little coordination or communication between Federal agencies and the affected coastal states prior to major energy resource development decisions, such as the decisions to lease large tracts of the OCS for oil and gas.
>
> ...Full implementation of the Coastal Zone Management Act of 1972...could go far to institute the broad objectives of Federal-State cooperative planning envisioned by the framers of the act. S.Rep. No. 277, 94th Cong., 2d Sess. 3 (1976); reprinted in 1876 U.S. Code Cong. & Ad. News 1770. [emphasis supplied]

The House, in describing Federal OCS leasing activity, stated:

> ...it is difficult to imagine that the original intent of the Act was not to include such a major federal action within the coverage of federal consistency. H. Rep. No. 878, 94th Cong., 2d Sess. 52-53 (1976).

The final House Report for the Outer Continental Shelf Lands Act Amendments expressly states that Interior's leasing decision is to be reviewed for consistency:

> The Committee is aware that under the Coastal Zone Management Act of 1972, as amended in 1976 (16 U.S.C. 1451 et seq.) certain OCS activities including lease sales and approval of development and production plans must comply with consistency requirements as to coastal zone management plans approved by the Secretary of Commerce. H. Rep. No. 590, 95th Cong., 1559 fn. 52 (1978); reprinted in U.S. Code Cong. & Ad. News at 1559 fn. 52; [emphasis supplied]

In 1980 Congress conducted a comprehensive examination of the CZMA and enacted the Coastal Zone Management Improvement Act of 1980. The House Report notes that "the primary purpose of H.R. 6979 is to reaffirm the nation's commitment to the wise use and management of our coastal resources through the coastal management program." H. Rep. No. 1012,

96th Cong., 2d Sess. 14 (1980). Because of its awareness of the dispute over the meaning of §307(c)(1), Congress specifically addressed the definition of the phrase "directly affecting" and made clear its intent that the Department of Interior's lease sale decision must be reviewed for consistency.

Congress stated expressly that the federal lease sale decision meets the "directly affecting" threshold. The Senate Report, after reviewing the legislative history of the 1976 amendments to the CZMA, reaffirmed that "The Department of Interior's activities which preceded lease sales were to remain subject to the consistency requirements of Section 307(c)(1)" and that federal-state "coordination must continue during the critical exploration, development, and production stages." S. Rep. No. 783, 96th

Cong., 2d Sess. 11 (1980); [emphasis supplied]. The House Report similarly states that the 1976 amendments to §307(c)(1) "did not alter Federal agency responsibility to provide states with a consistency determination related to OCS decions which preceded issuance of leases." H. Rep. No. 1012, 96th Cong., 2d Sess. 28 (1980); [emphasis supplied]. Such unequivocal expressions of legislative intent are rare, and in this case they are highly persuasive of the ambit of the "directly affecting" language in the CZMA.

In addition Congress specifically addressed the phrase "directly affecting" and offered two interpretations. Both the House and Senate Reports point out the importance of timely consistency review and emphasize that consultation between federal and state agencies should occur at the "earliest practicable time". H. Rep. No.

1012, 96th Cong., 2d Sess. 34 (1980); S.Rep. No. 783, 96th Cong., 2d Sess. 11 (1980); reprinted in U.S. Code Cong. & Ad. News 4382-83. The House Report indicates support of "an expansive interpretation of the threshold test" and notes that the "directly affecting" threshold test was:

> considered during earlier congressional deliberations and was determined to apply whenever a Federal activity had a functional interrelationship from an economic, geographic or social standpoint with a State coastal program's land or water use policies . . . Thus, when a Federal agency initates a series of events of coastal management consequence, the intergovernmental coordination provisions of the Federal consistency requirements should apply. H. Rep. No. 1012, 96th Cong., 2d Sess. 34-35 (1980); reprinted in U.S. Code Cong. & Ad. News 4382-83.

The House language was quoted favorably in the Senate Report: "Intergovernmental coordination for the purposes of OCS development commences at the earliest practicable time in the opinion of the

Committee, as the Department of Interior sets in motion a series of events which have consequences in the coastal zone.[1] S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980).

The Ninth Circuit stated "[I]n the circumstances of this case we accord (the 1980 Committee Reports) substantial weight because they appear to us to serve better the purposes of the CZMA than would the narrower interpretation urged by the federal appellants." State of Cal., Etc. v. Watt, 683 F.2d at 1262. The Court concluded the leasing decision does "directly affect" the coastal zone, and therefore must be reviewed for consistency.

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[1]As noted earlier this report also stated expressly that Interior's leasing decisions met the §307(c)(1) threshold test.

C. NOAA's Longstanding Interpretation of Section 307(c)(1) is Entitled to Deference.

In determining the meaning of §307(c)(2) the interpretation of NOAA, the agency charged with promulgating rules for the CZMA is entitled to deference. Train v. NRDC, 421 U.S. 60, 87, 95 (1975); Udall v. Tallman, 380 U.S. 1 (1965). NOAA's expertise in national coastal matters also suggests that deference should be accorded. See, Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1 (D.C. 1976).

Until May, 1981, NOAA consistently took the position that Interior's leasing decision is subject to consistency reviews. 43 Fed. Reg. 10510 (1978); 44 Fed. Reg. 37142 (1979); State of California v. Watt, 520 F.Supp. 1359, 1376 (C.D. Cal. 1981); State of Cal. Etc. v. Watt, 683 F.2d 1253, 1262 (9th Cir. 1982). NOAA's final

regulations in 1978 and their 1979 amendments favor liberal construction of the §307(c)(1) threshold test so as to favor inclusion of fedreal activities subject to consistency review. 43 Fed. Reg. 10510, 10519 (1978); 44 Fed. Reg. 37142, 37146-47 (1979). NOAA explained that "implementation of this requirement at the OCS prelease stage should lead to minimization of adverse coastal environmental and socioeconomic impacts thereby reducing conflicts with affected states and avoiding delay in the exploitation of offshore energy resources." 44 Fed. Reg. 37142, at 37142 (1979).

Shortly after commencement of the present case, in an abrupt departure from its previous interpretations, NOAA filed a notice of proposed rulemaking defining "directly affecting" "in a way more nearly consistent with, if not identical to" that

urged by Interior. State of Cal., Etc. v. Watt, 683 F.2d at 1262; 46 Fed. Reg. 22658, 22659-60 (1981). In the comments to this notice, NOAA lists Interior's lease decision as an activity which does not directly affect the coastal zone. On July 2, 1981, NOAA issued its notice of final rulemaking. In late July and early August resolutions were introduced in both houses of Congress disapproving NOAA's new regulations. Following the district court decision in this case and a vote by the House Merchant Marine and Fisheries Committee to disapprove the new regulations, NOAA published notice that suspended the effective date of the regulation and recommended their recission. 46 Fed. Reg. 50937, 50976 (1981).

The trial court and the appellate court concluded that NOAA's longstanding liberal construction of the consistency

requirement is entitled to deference and that the agency's short-lived, narrow definition of "directly affecting" is not persuasive. State of California v. Watt, 520 F.Supp. at 1378; State of Cal., Etc. v. Watt, 683 F.2d at 1263. As noted by the Ninth Circuit, "To defer to such a passing phase in the appropriate agency's interpretation would amount to obeisance to shadows and a flight from judicial responsibility." State of Cal., Etc. v. Watt, 683 F.2d at 1263.

D. All Applicable Precedent Supports the Holding that Lease Sale 53 Directly Affects the Coastal Zone.

All courts having considered the issue flatly rejected the reading of "directly affecting" urged by Interior and determined the federal leasing decision must be reviewed for consistency. The lower courts in the present case found that a federal

activity directly affects the coastal zone if it either "sets in motion a chain of events which has consequences in the coastal zone" or if it has a "functional interrelationship from an economic, geographic, or social standpoint with lands and waters in the coastal zone." State of California v. Watt, 520 F.Supp. at 1359; State of Cal., Etc. v. Watt, 683 F.2d at 1253. Applying these definitions both courts found that OCS Lease Sale 53 "directly affects" California's coastal zone and required the Department of Interior to provide a consistency determination. Id.

Following these decisions by the district court and the Ninth Circuit, a Third Circuit district court also rejected the reading of "directly affecting" urged by Interior, and ordered the Department of Interior to provide a consistency deter-

mination for certain tracts of an OCS lease sale off the New Jersey coast. Kean v. Watt, No. 82-2420 (D.N.J., filed Sept. 7, 1982), appeal docketed, No. 82-5679 (3d Cir., Dec. 30, 1983).[2]

A First Circuit district court likewise rejected Interior's argument, holding that the entire lease sale at issue "directly affects the Massachusetts Coastal Zone and therefore is subject to the

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[2]The court's statement that OCS activities which cause adverse economic impact but do not affect the natural environment of New Jersey's coastal zone do not meet the section 307(c)(1) threshold test is under appeal to the Third Circuit and has been expressly rejected by a First Circuit district court: Massachusetts v. Watt, No. 83-0530 (D. Mass., filed March 28, 1983). This statement does not alter the New Jersey district court holding that where impacts on the natural environment of the coastal zone are shown, the Department of Interior must provide a consistency determination at the lease sale stage, contrary to Interior's arguments that consistency certification is only to be provided by individual lessees' later certification.

consistency requirements of the Coastal Zone Management Act." Massachusetts v. Watt, No. 83-0530 (D. Mass., filed March 28, 1983).

Amicus urges this Court to affirm the decision and the reasoning of the Ninth Circuit with respect to whether the decision to conduct a lease sale for oil and gas exploration on the outer continental shelf "directly affects" the coastal zone in accordance with the CZMA. The nature of the CZMA and the legislative history of the "directly affecting" language evidence a specific congressional intent that pre-leasing activities by the Department of Interior are to be reviewed for consistency. Indeed, requiring a consistency review at the pre-leasing stage not only insures compliance with expressed Congressional intent it also presents the only opportunity for overall review of an

entire program, thus helping to preserve the integrity of the coastal zone and to prevent wasteful expenditure of public funds on activities which might later be found inconsistent.

ARGUMENT II

THE CIRCUIT COURT OF APPEALS ERRED BY ADDRESSING THE EXTENT TO WHICH THE CZMA REQUIRES FEDERAL ACTIVITIES TO BE CONSISTENT WITH STATE MANAGEMENT PLANS OUTSIDE THE CONTEXT OF AN ACTUAL DISPUTE.

This issue and the issue which follows concern the application of the second half of Section 307(c)(1) of the CZMA, 16 U.S.C. §1456(c)(1)(1976), to the lease sale stages of Outer Continental Shelf oil, gas and mineral development. Section 307(c)(1) reads:

> Each federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

The Court of Appeals, in response to language in the District Court opinion indicating that the Department of Interior had to conduct all its lease sale activities on the tracts at issue in a manner consistent with California's Coastal

Zone Management Plan, felt compelled to address the meaning of the phrase "to the maximum extent practicable, consistent with approved state management programs." State of Cal., Etc. v. Watt, 683 F.2d 1253, 1264-65 (9th Cir. 1982). This disquisition on the meaning of the second half of Section 307(c)(1) was unnecessary and improper because a consistency determination was not done in this case. By merely adding the limiting language from Section 307(c)(1) to the lower court's Order for relief, the Circuit Court of Appeals would have accomplished all that was necessary or appropriate.

Pursuant to congressional mandate, the National Oceanic and Atmospheric Administration developed an elaborate regulatory scheme to administer and enforce the consistency requirements of Section 307(c)(1). 16 U.S.C. §1463 (1976); 15

C.F.R. §930.30-.44 (1983). This regulatory system was designed to focus the factual and legal issues which arise in a consistency dispute, establish an accurate record and enhance the likelihood of the resolution of conflicts without resort to litigation.

The Court has shown great reluctance to address issues arising from speculation about the administration and enforcement of state and federal legislation and administrative regulations where an adequate factual record is necessary for a proper decision or a prudent application of the rules or statues might result in no litigation. Pacific Gas & Elec. v. Energy Res. Comm'n, ___ U.S. ___, ____, 75 L.Ed.2d 752, 763-64 (1983); Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1976). In addition, there is nothing in the record of this case to indicate that the withholding

of court consideration at this time will cause a hardship to the parties. Id. at 149. Whether the Department of Interior's lease sale activities are consistent to the maximum extent practicable with California's Coastal Zone Management program is an issue which will be ripe for decision, if ever, after the parties have complied with NOAA's regulations.

ARGUMENT III

THE CIRCUIT COURT OF APPEALS ERRED IN ITS CONSTRUCTION OF THE PHRASE "TO THE MAXIMUM EXTENT PRACTICABLE, CONSISTENT WITH APPROVED STATE MANAGEMENT PROGRAMS".

The legislative history and subsequent administrative interpretation of Section 307(c)(1) conflict with the Court of Appeals' construction of the phrase "to the maximum extent practicable, consistent with approved State Management Programs."

An established principle of statutory construction requires that in interpreting a statute the court turn first to the language in which the act is framed. If it is plain and subject to only one meaning, the statute should be enforced according to its terms. Caminetti v. United States, 242 U.S. 470, 485 (1917). From the bare words of this statute it is not possible to tell precisely to what extent Congress intended state management programs to influence the

activities of federal agencies which directly affect state coastal zones. Section 307(c)(1) does not provide any standards or guidelines to aid in its interpretation.

Apparently, without referring to the legislative history of the Act and other sources of statutory construction, the Circuit Court of Appeals attempted to provide some guidance to the Department of Interior as to what degree its lease sale activities would have to conform to California's Coastal Zone Management Program. Some of the comments of the Court conflict with the intent of the legislators who passed the Act:

> The statute does not provide that a state's plan takes precedence when it would preclude the federal activity, or even that the Federal activity must be as consistent with the plan as is possible. It only provides that the activities be consistent to the maximum extent practicable . . . . The limit

> beyond which conformity with the state plan would not be practicable to the maximum extent cannot be precisely delineated. Such factors as the extent to which leasing, exploration, development, drilling and production would be hampered or proscribed by conformity; the reasonableness of the state plan; as well as the terms of the particular proposed lease sale must be examined. State of Cal., Etc. v. Watt, 683 F.2d 1253, 1264-65 (9th Cir. 1982)

The discussion of the appellate court could be interpreted to imply that Section 307(c)(1) of the CZMA does not impose major substantive requirements on federal agencies contemplating activities directly affecting state coastal zones. The Court of Appeals suggested that in determining if consistency is practicable, it is appropriate for federal agencies to consider the reasonableness of the state plans even after they have been approved.

When construing statutes, it is the duty of the courts to give effect to the intent of Congress. Philbrook v. Glodgett,

421 U.S. 707, 713-14 (1975); Ozawa v. United States, 260 U.S. 178, 194 (1922). Is is appropriate to refer to the legislative history of a statute however clear its words may appear on superficial examination. United States v. American Trucking Association, 310 U.S. 534, 543-44 (1940); Train v. Colorado Pub. Int. Research Group, 426 U.S. 1, 10 (1976); Hunt v. Nuclear Regulatory Commission, 611 F.2d 332, 336 (10th Cir. 1979), cert. denied, 445 U.S. 906 (1980). Section 307(c)(1) of the CZMA originated in the House of Representatives. H. Rep. No. 1049, 92d Cong., 2d Sess. 5 (1972). In its report to the Whole House, the Committee on Merchant Marine and Fisheries discussed how Section 307(c)(1) was to relate to the rest of Section 307:

> Subsection (c) provides that once a state management program has been approved pursuant to the procedures set forth in the bill, it is expected that each federal agency in

conducting and supporting activities in the coastal zone will see that those activities are consistent with the program. Under the procedures established, the Secretary is required to consult with all cognizant federal agencies prior to approval of a program. It is anticipated that during this process any aspects or phases of the proposed program which are deemed by any agency to be impractical to carry out or support will be brought to the attention of the Secretary and steps will be taken at that point to iron out whatever difficulties appear to be established. There may, however, arise, after the approval of the program, some circumstances not foreseen at the time of its approval which may present a federal agency with an obstacle or situation which as a practical matter may prevent complete adherence to the approved program. For that reason, the Committee felt that some leeway should be written into the statute with respect to activities of federal agencies in connection with approved programs.

It is not anticipated that there will be any considerable number of situations where as a practical matter a federal agency cannot conduct or support activities without deviating from approved state management programs. H. Rep. No. 1049, 92d Cong. 2d Sess. 20 (1972).

It is apparent from the legislative history of Section 307(c) that Congress intended that federal agencies would conduct their activities consistent with State Coastal Zone Management Programs. During the approval process, all relevant federal agencies were to be given the opportunity to comment on the proposed state plan. H. Rep. No. 1049, 92d Cong. 2d Sess. 4, 5 (1972); 16 U.S.C. §1455(c)(1), 1456(b)(1976). Difficulties caused by the reasonableness of the plan were to be resolved prior to approval. However, Congress did intend the CZMA to be flexible enough to accommodate federal agencies whose activities due to unforeseen circumstances were in conflict with approved State Management Plans. These activities would not have to be conducted in a manner fully consistent with State Management Programs. This is what was intended by the

phrase "to the maximum extent practicable, consistent with approved State Management Programs."

The language chosen by the Circuit Court of Appeals goes beyond the limited exception intended by Congress. There is nothing in the legislative history of the CZMA which suggests that it is appropriate for federal agencies to review the reasonableness of state plans subsequent to approval. The statutory language was merely intended to provide an exception in the event of circumstances not foreseen at the time of approval. The Committee report also indicated that these exceptions should be relatively rare. H. Rep. No. 1049, 92d Cong., 2d Sess. 20 (1972).

The Senate adopted the House version of the Coastal Zone Management Act of 1972. H. Rep. No. 1544, 92d Cong., 2d Sess. 1-11 (1972). Section 307(c)(1)

remained unchanged. H. Rep. No. 1544, 92d Cong., 2d Sess. 7 (1972). The conference report resulting from the two Houses of Congress indicated that "federal agencies must make certain that their activities are to the maximum extent practicable consistent with approved State Management Programs." H. Rep. No. 1544, 92d Cong., 2d Sess. 14 (1972).

The construction given statutory provisions by an administrative agency delegated the responsibility of promulgating rules and regulations to enforce or administer the legislation is normally entitled to deference from the courts. Train v. NRDC, 421 U.S. 60, 87 (1975); Udall v. Tallman, 380 U.S. 1, 16 (1965); Power Reactor Develop. Co. v. Electrical Union, 367 U.S. 396, 408 (1961); See also American Petroleum Institute v. Knecht, 456 F.Supp. 889, 908 (C.D. Cal. 1978), aff'd,

609 F.2d 1306 (9th Cir. 1979). The National Oceanic and Atmospheric Administration was the agency within the Department of Commerce delegated the responsibility of developing the regulations for the CZMA. NOAA promulgated the following regulations implementing Section 307(c)(1):

> (a) The term 'consistent to the maximum extent practicable' describes the requirement for federal activities including development projects directly affecting the coastal zone of States with approved management programs to be fully consistent with such programs unless compliance is prohibited based upon requirements of existing law applicable to the Federal agency's operations. If a Federal agency asserts that compliance with the management program is prohibited, it must clearly describe to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency's discretion to comply with the provisions of the management program. The duty, the Act imposes upon Federal agencies is not set aside by virtue of Section 307(e). The Act was intended to cause substantive changes in Federal agency

> decisionmaking within the context of the discretionary powers residing within such agencies. Accordingly, when read together, sections 307(c)(1) and (2) and 307(e) require Federal agencies, whenever legally permissible, to consider State-management programs as supplemental requirements to be adhered to in addition to existing agency mandates.
>
> (b) A Federal agency may deviate from full consistency with an approved management program when such deviation is justified because of some unforeseen circumstances arising after the approval of the management program which present the Federal agency with a substantial obstacle that prevents complete adherence to the approved program. 15 C.F.R. §930.32 (1983).

When Sections (a) and (b) of the regulation are considered together, they approximate the intent of the legislators who drafted and enacted Section 307(c)(1). It is important to note that NOAA has never formally proposed to withdraw this particular regulation.

In conclusion, the State of Florida would respectfully suggest that if the

Court declines to strike the discussion in the lower court opinion addressing the meaning of "consistent to the maximum extent practicable" for the reasons stated in the previous section of this brief, the Court adopt NOAA's construction of Section 307(c)(1). 15 C.F.R. §930.32 (1983).

CONCLUSION

Amicus Curiae joins the Cross-Petitioners, State of California, et al., in urging the Court to affirm the decision of the Court of Appeals with respect to its conclusion that leasing activities on Outer Continental Shelf lands by the Department of Interior "directly affect" the coastal zone and therefore must, to the maximum extent practicable, be consistent with approved state coastal programs. Amicus Curiae urges the Court to strike the dicta of the Court of Appeals with respect to the meaning of the phrase "consistent to the maximum extent practicable," or, in the alternative, to substitute the meaning given that phrase by the National Oceanic and Atmospheric Administration.

Respectfully submitted,

JIM SMITH
Attorney General

GERALD B. CURINGTON
BRUCE BARKETT
Assistant Attorneys General
Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32301

DEBRA SWIM, Attorney
Office of the Governor
The Capitol
Tallahassee, Florida 32301

DENNIS R. ERDLEY
Assistant General Counsel
Florida Department of
Environmental Regulation
Tallahassee, Florida 32301

No. 82-1511-CFX
Status: GRANTED

Title: California, et al., Petitioners
v.
Secretary of the Interior, et al.

Docketed:
March 11, 1983

Court: United States Court of Appeals
for the Ninth Circuit

Vide:
82-1327
82-1326

Counsel for petitioner: Berger, Theodora, Orr, Trent William

Counsel for respondent: Solicitor General, Bruce, E. Edward, Knopf, Greer D., Kase Jr., Joseph

Entry	Date	Note	Proceedings and Orders
1	Mar 11 1983	G	Petition for writ of certiorari filed.
2	Apr 13 1983		Memorandum of respondent United States filed.
3	Apr 13 1983		Brief of respondent Western Oil & Gas Association, et al. in opposition filed.
4	Apr 20 1983		DISTRIBUTED. May 12, 1983
5	May 16 1983		Petition GRANTED. The case is consoliated with 82-1326 and 82-1327 and a total of one hour is alloted for oral argument.
			**********
7	Jun 1 1983		Order extending time to file brief of petitioner on the merits until July 11, 1983.
8	Jul 11 1983		Joint appendix filed. VIDED.
9	Jul 13 1983		Brief amicus curiae of State of Florida filed.
10	Jul 19 1983	G	Motion of Western Oil and Gas Association, et al. for divided argument filed.
11	Jul 15 1983	X	Brief of petitioners NRDC, et al. filed.
12	Jul 28 1983	G	Motion of Humboldt County, et al. for divided argument filed.
13	Jul 18 1983		Record filed.
14	Jul 18 1983		13 volumes of certified original record and C. A. proceedings received.
16	Aug 10 1983		Order extending time to file brief of respondent on the merits until August 20, 1983.
17	Aug 19 1983		Brief of respondents Western Oil & Gas Assn., et al. filed.
25	Aug 19 1983		Brief of Federal Cross-Respondents filed.
26	Aug 30 1983		CIRCULATED.
27	Sep 8 1983		Motion of Western Oil and Gas Association, et al. for divided argument GRANTED. The request for additional time for oral argument is denied.
28	Sep 8 1983		Motion of Humboldt County, et al. for divided argument GRANTED. The request for additional time for oral argument is denied.
29	Sep 21 1983		SET FOR ARGUMENT. Tuesday, November 1, 1983. (First Case) This case is consolidated with Nos. 82-1326 and
30	Sep 21 1983		and 82-1327. (1 hour for argument)
31	Oct 21 1983		Reply brief of Cross-Petitioners California, et al. filed.
32	Nov 1 1983		ARGUED.